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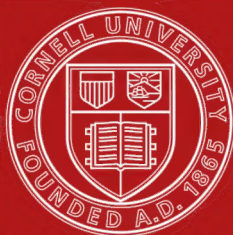
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A treatise on the law of evidence as adm



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A TREATISE
ON THE
LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND ;

WITH ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN,
AND OTHER LEGAL SYSTEMS.

BY HIS HONOUR
THE LATE JUDGE PITT / TAYLOR.

Ninth Edition.
(IN PART RE-WITTEN)
BY G. PITT-LEWIS, Q. C.

With Notes as to American Law
BY CHARLES F. CHAMBERLAYNE.

IN THREE VOLUMES.

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PART III.

PARTICULAR KINDS OF EVIDENCE.

CHAPTER I.

EVIDENCE ADDRESSED TO THE SENSES.

§ 554. THE first degree of evidence, and that which, though open to error and misconception, is obviously most satisfactory to the mind, is afforded by our own senses.¹ "Believe half what you yourself see, and a twentieth part of what you hear from others," is a maxim, founded in the main upon the experience of life, marking the vast distinction that obtains between a knowledge of facts derived from actual perception, and the belief of the existence of facts resting on information. In judicial proceedings, the judge or jury can seldom act *entirely* upon evidence of this description.² In a vast number of instances, however, especially where the fact in dispute is sought to be proved by circumstantial evidence, the verdict will rest materially upon matter submitted to the ocular inspection of the jury.

§ 555. Indeed, in all cases in which the guilt or innocence of a

¹ "Segnius irritant animos demissa per aurem,
Quam quæ sunt oculis subjecta fidelibus, et quæ
Ipse sibi tradit spectator."—HOR. *Ars Poet* l. 180.

So, also, in Shakespeare's "Rape of Lucrece," we read,—
"To see sad sights moves more than hear them told,
For then the eye interprets to the ear."

² Though, when pregnancy is pleaded, a jury of matrons is empowered to decide the issue upon examination of the person of the prisoner: Baynton's case, 1702; R. v. Wycherley, 1838. But even here it appears, from the last of the cases

just cited, that the matrons may, in addition to their personal inspection, hear the evidence of a surgeon; but in that event he must be examined as a witness in open court. See, also, Lady Essex's case, 1613.

prisoner depends upon the identity of two articles found in different places, it is highly expedient that a direct appeal be made to the senses of the jury, and that the actual articles to be compared should be produced in court. Thus, on an indictment for stealing corn, where the prisoner's possession of wheat, apparently resembling a quantity from which a portion has been recently taken, is relied upon by the prosecution, a comparison by the jury of the wheat found upon the prisoner with a sample of that belonging to the prosecutor, will evidently be more satisfactory than for its identity to be sworn to by a witness, who has examined the two lots out of court. It is true that the jury may come to an erroneous conclusion in such a case; for either the witnesses, who state that the two parcels of wheat produced were respectively taken from the prisoner and the prosecutor, may intentionally or accidentally assert what is not true, or the jurors themselves may be mistaken in assuming the identity or non-identity of the grain. Still, in the event of a witness being called to state the result of his previous examination of the two samples, these sources of error will both equally exist, while, in the latter case, there is also the further possibility that the witness may tell a fabricated story with little danger, since examination as to mere matters of opinion is almost necessarily inconclusive. Similar considerations arise where it is necessary to compare two articles found in different places; as, for example, the wadding of a pistol with portions of a torn letter found on the person of the accused; the fractured bone of a sheep with mutton found in his house; or fragments of dress with his rent garment; or to compare damaged property with the instrument by which the damage is supposed to have been effected.

§ 555A. However, the rule which demands the production of the best evidence does not expressly require that the course suggested should always be adopted, but permits a witness to testify as to his having made the comparison, without first proving that the articles cannot be produced at the trial. Nevertheless the non-production of articles which could be produced, when unexplained, often generates a suspicion of unfairness, and will always furnish an occasion for serious comment.¹ A well-known instance of the

¹ See ante, § 117.

application of this principle occurred where a boy having found a diamond, took it to a jeweller, who refused to return it to him, or to produce it at the trial, on which the jury were directed to presume that this diamond was one of the finest water.¹ Another instance of the principle was furnished by a case² in which, the point at issue being whether "Running Rein," a Derby-winner of 1844, had been foaled by "Mab" in 1841, the plaintiff, being unable to comply with an order of the court to produce "Running Rein," submitted to a nonsuit.

§ 556. In such cases as these, however, where the personal examination of the articles by the jury themselves is very valuable, they ought, in certain instances, to be assisted by persons conversant with the particular articles produced. For instance, on a question whether two samples of wine be drawn from the same bin, or two pieces of cloth be the produce of the same loom, or two coins be struck in the same die, a wine-merchant, a clothier, or an officer of the Mint,³ should respectively be called. Still, even here the articles should be produced, that the jury may test the accuracy of the opinions expressed by the witnesses, and may perceive that the reasons, upon which those opinions are founded, correspond with the actual state and condition of the articles themselves. These observations are especially applicable in comparisons of disputed handwriting—the mere fact that an expert *says* that two specimens of handwriting are similar or dissimilar is of little value, but becomes of great weight if he can point out to the jury peculiar features of similarity or dissimilarity in them.

§ 557. Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions, or enlisting the sympathies of the jury, lead them to overlook the

¹ *Armory v. Delamirie*, 1721.

² *Wood v. Peel*, 1844, cor. Alderson, B., MS.

³ By 24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), § 29, in order to prove coin to be counterfeit,

it is not necessary to call any moneyer or other officer of the Mint, but is sufficient to prove that fact by the evidence of any other credible witness.

necessity of proving in what manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions, which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirist.¹

§ 558. In causes relating to disputed rights of way, light, or water, or otherwise, involving some question which depends on the relative position of places, it is often desirable that the jury should have an opportunity of *viewing the spot* in controversy;² since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps or plans, which are often inaccurate and obscure, and may perhaps have been prepared with an express view to mislead. A clause providing machinery to direct a view of the place in question, "where proper, after writ issued by order of the court or a judge," is contained in the Jury Act of 1825.³

§ 559. The Act just cited extends to criminal cases depending in the superior court.⁴ In civil actions it, however, extended only to such as those for trespass, quare clausum fregit, ejectment, or

¹ For instance, Shakespeare makes Jack Cade's nobility rest on this foundation: for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, "was by a beggar woman stolen away," "became a bricklayer when he came to age," and was his father; one of the rioters confirms the story, by saying, "Sir, he made a chimney in my father's house, and the bricks are alive at this day to testify it: therefore, deny it not."—Second Part of Hen. 6, act 4, scene 2. Whatley makes use of the above anecdote in his diverting "Historic Doubts relative to Napoleon Buonaparte," p. 28, 6th edit., and adds, "Truly this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold." So, in the interesting story

of "The Amber Witch" ("Amber Witch," translated by Lady Duff Gordon, pp. 78—80), the poor girl charged with witchcraft,—after complaining that she was the victim of the sheriff, who wished to do "wantonness with her,"—added, that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the sheriff replied, "that it was his little lap-dog, called Below, which had scratched him, while he played with it that very morning," and having produced the dog, the Court were satisfied with the truth of his explanation.

² For an early instance of this being ordered, see *Mossam v. Ivy*, 1684.

³ 6 G. 4, c. 50, §§ 23, 24 ("The Juries Act, 1825").

⁴ See *Id.*

waste.¹ The cumbrous machinery it provided having been first improved,² the narrow construction placed upon this Act led³ to its being practically superseded, so far as regards civil causes, by § 58 of the C. L. P. Act, 1854.⁴

§ 560. The last-named is itself now repealed,⁵ and the law on the subject, so far as concerns civil cases, is governed by the R. S. C., 1883, Ord. L. Rule 3 of this Order, in general terms, gives the court or a judge power, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the *detention, preservation, or inspection of any property or thing*, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorise *any persons* to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. Rule 4 of the same Order gives power to any *judge*, by whom any cause or matter may be heard or tried with or without a jury, or before whom any cause or matter may be brought by way of appeal, to *inspect* any property or thing concerning which any question may arise therein. Rule 5 extends the provisions of Rule 3 to *inspection by a jury*, and gives the court or a judge power in such a case to make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place, and in such manner as they or he may think fit. Finally, Rule 6 provides that an application for an order under Rule 3 may be made to the court or a judge by any party. "If the application be by the plaintiff, it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application."

¹ See *Stones v. Menhem*, 1848.

² By 15 & 16 V. c. 76, § 114.

³ On the recommendation of the C. L. Commissioners contained in

their 2nd Report, at p. 37.

⁴ 17 & 18 V. c. 125.

⁵ By 46 & 47 V. c. 49.

§ 561. Very similar (though not identical) provisions are in force in Ireland.¹

§ 562. Powers of directing a view are also possessed by the court in which such actions are pending, in actions under the Patents, Designs, and Trade Marks Act, 1883;² by the Admiralty Court;³ and a *Referee* and his assessors (if any) to whom an action pending in the High Court, or any cause or matter, or any question in any cause or matter, has been referred, also possess powers of ordering an inspection or a view.⁴

§§ 563—5. All these powers to order views of places or inspection of property, whether granted by statute or rule, give to the courts and judges, by implication, authority to order all things ancillary to the view or inspection required. Where, therefore, a wall had recently been erected in a mine, so as to obstruct a complete inspection of the workings, the court, on a question of encroachment, ordered the removal of such obstruction.⁵

§ 566. County Courts,⁶ Barmote Courts⁷ and Courts-martial,⁸ also possess power of ordering a view or an inspection. But with these important exceptions the power of ordering a view appears to exist only, and so far as regards the R.R. S. C. of 1883⁹ are expressly confined to, the High Court and its judges. It is suggested that the most extensive power of directing a view ought to be extended to every court of record and also to all criminal proceedings, the practice in which respecting views still rests on the inadequate provisions of the Acts of 1825 and 1852.¹⁰ In short, the presiding judge at *any* trial ought to be expressly empowered to order a view,

¹ See 16 & 17 V. c. 113.

² 46 & 47 V. c. 57, § 30.

³ Under 24 & 25 V. c. 10 ("The Admiralty Court Act, 1861"), § 18. See 30 & 31 V. c. 114, § 66, *Ir.* See, also, *The Germania*, 1868.

⁴ Ord. XXXVI. r. 48.

⁵ *Bennett v. Griffiths*, 1861.

⁶ *Cy. Ct. Rules*, 1889, Ord. XII. r. 3.

⁷ See 14 & 15 V. c. 94, 1 Sch., §§ 22—28, and 2 Sch. Form.

⁸ 44 & 45 V. c. 58 ("The Army Act, 1881"), § 53, subs. 7.

⁹ R. S. C. 1883, Ord. LXVIII. r. 1.

¹⁰ 6 G. 4, c. 50, §§ 23 and 24 ("The Juries Act, 1825"); 15 & 16 V. c. 76, § 114, both cited ante, § 558. As to the existing practice in criminal cases which have been removed into the Queen's Bench Division of the High Court, see *Short & Mellor's Crown Office Practice*, pp. 215 et seq. An order for a view is drawn up as of course. See *Crown Office Rules*, r. 252.

even *after the evidence may have been heard*,¹ if in his opinion such a step is necessary for the purposes of justice.

¹ In *R. v. Martin*, 1872 (C. O. R.), the Court of Crim. Appeal held that the deputy assistant judge for the Middlesex Sessions, on the trial of a misdemeanour, was empowered to allow the jury to have a view of the

premises in question, after he had summed up the evidence to them. Here, however, no argument was heard, and the attention of the judges was not directed to any of the statutes on the subject.

AMERICAN NOTES.

Real Evidence. — As is implied by its derivation from the latin *res*, the phrase under consideration indicates the evidence furnished by *things*, as distinguished from persons. This is Bentham's idea. "By real evidence, I understand all evidence of which any object belonging to the class of things is the source; persons also included, in respect of such properties as belong to them in common with things." 3 *Rationale Jud. Ev.* p. 26. Bentham, indeed, divides the genus into two species. (1) The evidence furnished by things, which is brought to the tribunal by witnesses. (2) The evidence which things (and persons considered as things) furnish to the tribunal itself. "Physical real evidence (whether issuing from a real or from a personal source) requires to be distinguished into *immediate* and *reported*. I call it immediate, in the case where the thing which is the source of the evidence is made present to the senses of the judge himself. I call it reported, in the case where it is not made present to the senses of the judge himself — but the state of it in respect of the evidence, the evidentiary facts afforded by it, is presented to the judge no otherwise than by the report of it made by a person, by whom (in the character of a percipient witness) the state and condition of it in respect of the evidentiary facts in question is reputed by him to have have been observed." 3 *Ibid.* p. 33 (1802 — 1812).

A USELESS DISTINCTION. — It seems an unnecessary and useless refinement to distinguish in the oral testimony of witnesses between facts which these witnesses have derived from persons and those which they have derived from observation of things. With the exception of oral statements, most circumstantial evidence is real in this sense.

But real evidence, in the sense of immediate real evidence — the information which the court or jury receives from seeing things themselves, actually produced in court, is quite a different matter. The phrase then represents a class of evidence which it is well worth distinguishing. The court sees for itself; — *res ipsa loquitur*.

It is always difficult and frequently impossible so accurately to describe a thing as to communicate the impression formed in the mind of the witness to the mind of the tribunal. Producing the thing itself for inspection answers the purposes of evidence perfectly. To this inherent advantage of real evidence is added another: — namely, that the chances for error on the part of the tribunal are largely decreased. In all cases where witnesses testify, even directly, lurks a double danger (1) that the witnesses may not observe correctly or may not draw correct inferences from what they

see, and (2) that their evidence may be misunderstood. Where the court itself stands in the position of the observing witness, the second opportunity for error from human fallibility is removed.

MIXED REAL EVIDENCE. — Much real evidence comes to the tribunal of fact involved and blended with personal evidence.

It had been said that persons, considered as things, may furnish real evidence. Instances of this have been found in cases involving an inspection of a witness or other person present in court as to age, color, race, or resemblance to other persons, said to stand in certain relations to the person in question.

To a certain extent every witness is under inspection while on the stand or in court and furnishing thereby real evidence. What he says is of course personal evidence, under Bentham's classification. But while testifying as a witness and indeed at all times, at the option of the tribunal while in its sight, every witness is creating an impression, favorable or otherwise, as to his bias, veracity and general reliability. That this is done by means so subtle and in ways so numerous as to elude statement, and sometimes conscious recognition does not detract in the least from the force of this kind of evidence. It is this which largely assists to create the "atmosphere" of a trial, — frequently impressive, though intangible; which enables a jury to decide on conflicting testimony and makes the court of appeal which has merely the statements of the witnesses without these tests and earmarks of truth, loath to disturb the verdict of a tribunal which has had the benefit of them.

The same statements are true, to a lesser degree, in case of a document. Its contents are an instance of personal evidence. But the paper, or other substance forming it, may on inspection furnish much evidence to the tribunal. It is probably principally for this reason, as applied to erasures and other blemishes, that the early laws of pleading required *profert* of sealed instruments.

Thus on an issue involving the validity of a will, the attention of the court and jury may be called to evidence that the signature is a simulated and counterfeited hand, *Withee v. Rowe*, 45 Me. 571 (1858). As to evidence, in connection with an examination of the will itself, that the signature is "entirely unlike and could not have been written by the same hand" as certain genuine documents. *Demeritt v. Randall*, 116 Mass. 331 (1874). So in an action on a promissory note where the defence of forgery is relied on, that the body of the note, which was written in blue ink, had been written after signature by the maker, which was written in black ink, because certain parts of the blue ink passed on and overlapped the black ink; that there was an erasure in the note; that the erasure was made at a certain time relative to the writing of the body of the note; whether either of the edges of the note were cut edges, or the ordinary foolscap edge; — "are all facts apparent and obvi-

ous upon an inspection of the note." *Dubois v. Baker*, 30 N. Y. 355 (1864).

In a similar way, the jury may compare a disputed handwriting with a specimen admitted to be genuine. *Wilson v. Beauchamp*, 50 Miss. 24 (1874); *Calkins v. State*, 14 Oh. St. 222 (1863); *Vinton v. Peck*, 14 Mich. 287 (1866).

Experts may point out to the court the facts visible on inspection of a document. "It is very true that the jury may examine the paper for themselves and that opinions are not usually admissible where the jury can form their own conclusions unaided. But we do not think it would be safe in this country to adopt a rule which assumes such a degree of knowledge and skill among jurors" as to dispense with assistance in recognizing the facts visible on inspection of a document. *Vinton v. Peck*, 14 Mich. 287 (1866); *Dubois v. Baker*, 30 N. Y. 355 (1864); *Wilson v. Beauchamp*, 50 Miss. 24 (1874); *Calkins v. State*, 14 Oh. St. 222 (1863); *Withee v. Rowe*, 45 Me. 571 (1858); *Demeritt v. Randall*, 116 Mass. 331 (1874).

Constant and apparently increasing use is made of the aid which actual inspection can give the court.

On an indictment for homicide in killing a person by the use of improper building materials, especially inferior mortar, used in the construction of a tenement house, specimens of the mortar used by the defendant and of mortar properly prepared were received in connection with the testimony of an expert witness as to the differences. *People v. Buddensieck*, 103 N. Y. 487 (1886).

In a highway accident case, the shoes of the horse who was injured may be exhibited to the jury in connection with the evidence of a blacksmith that the corks were not appropriate for the season of the year in which he was being driven. *Evarts v. Middlebury*, 53 Vt. 626 (1881).

Where samples of paving stones used in paving a street in front of the defendant's residence were offered in evidence it was held not necessary to produce any of the identical stones used in the construction. *Philadelphia v. Rule*, 93 Pa. St. 15 (1880). In an action to recover for injuries from the fall of a derrick caused by the breaking of an iron hook, which the plaintiff claimed was insufficient, a portion of the broken hook may be exhibited to the jury, together with evidence as to its weakness and the causes of it. *King v. New York Central &c. R. R.* 72 N. Y. 607 (1878).

RESEMBLANCE. — On questions of the relationships between persons "where the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance in connection with others, to be considered." *Jones v. Jones*, 45 Md. 144 (1876); *Stumm v. Hummel*, 39 Ia. 478 (1874).

So in a bastardy case, the bastard may be exhibited to the jury,

and any resemblance to the putative father commented upon. "Why should not the jury be permitted (when they have the opportunity) to see for themselves and draw their own conclusions from their observation, as well as to hear witnesses depose as to their observation made in the same way?" *State v. Woodruff*, 67 N. C. 89 (1872); *Gaunt v. State*, 50 N. J. 490 (1888); *Gilmanton v. Ham*, 38 N. H. 108 (1859); *Finnegan v. Dugan*, 14 All. 197 (1867).

In Iowa, the exhibition to the jury of a child two years old in a bastardy proceeding has been held permissible. "It is a well-known fact that resemblances often exist between persons who are not related, and are wanting between persons who are. Still, what is called family resemblance is sometimes so marked as scarcely to admit of a mistake. We are of opinion, therefore, that a child of the proper age may be exhibited to a jury as evidence of alleged paternity." *State v. Smith*, 54 Ia. 104 (1880). Exhibition of a child three months old has, on the contrary, in the same state, been refused. *State v. Danforth*, 48 Ia. 43 (1878). In commenting on this, the court in *State v. Smith* (*ubi supra*) say, "A child which is only three months old has that peculiar immaturity of features which characterizes an infant during the time that it is called a babe. A child two years old or more has, to a large extent, put off that peculiar immaturity." On an indictment for seduction under promise of marriage, the child, resulting from the unlawful intercourse, can be exhibited to the jury to enable them to trace a resemblance to the defendant as bearing on the fact of sexual intercourse. *State v. Horton*, 100 N. C. 443 (1888).

On the contrary, it has been held error, in a bastardy complaint, to allow a child six months old to be exhibited to the jury for the purpose of basing an argument on the supposed resemblance. "In a case like this, where the child was a mere infant, such evidence is too vague, uncertain and fanciful, and if allowed would establish not only an unwise, but dangerous and uncertain rule of evidence." *Clark v. Bradstreet*, 80 Me. 454 (1888).

The reasons for this ruling are partly pointed out in *People v. Carney*, 29 Hun, 47 (1883), a bastardy case, where it was held error to allow the mother, when on the witness-stand, to be asked to examine the infant, and tell the jury the color of its eyes, and thereby enable them to compare the color with that of the defendant's eyes. "Common observation reminds us that in families of children, different colors of hair and eyes are common, and that it would be dangerous doctrine to permit a child's paternity to be questioned or proved by the comparings of the color of its hair or eyes with that of the alleged parent." *Ibid.*

Evidence of paternity from comparison with a very young infant should therefore "be very sparingly resorted to. It could scarcely

be said that a want of resemblance between the defendant and the child could be treated as a strong circumstance against the alleged paternity." *Udy v. Stewart*, 10 Ont. Rep. 591 (1886).

In certain jurisdictions, the evidence of inspection as proof of paternity in bastardy cases is not permitted, whatever the age of the child. So in Indiana. *Reitz v. State*, 33 Ind. 187 (1870); *Risk v. State*, 19 Ind. 152 (1862).

In Wisconsin, *Hanawalt v. State*, 64 Wis. 84 (1885). And in New York, *People v. Carney*, 29 Hun, 47 (1883).

Because inspection would be permitted on the question of resemblance it does not follow that evidence on the same point will be received. One claiming to be the son of A. cannot introduce the evidence of witnesses as to the resemblance between himself and A. "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another, with equal knowledge of the parties between whom the resemblance is proved to exist." *Jones v. Jones*, 45 Md. 144 (1876).

"The effect of the substitution of testimony for inspection is to put the subject-matter of investigation one further remove from its responsible judges, and thus to add to the infirmities inherent in proof of this class the additional danger of bias and imposition." *Gaunt v. State*, 50 N. J. Law, 490 (1888). The same case speaks of "the almost utter worthlessness of the testimony of witnesses adduced in the question of the resemblance of a bastard to an alleged parent."

In bastardy process, a complainant is not entitled to introduce the evidence of witnesses of a resemblance between the bastard and the putative father. *Eddy v. Gray*, 4 All. 435 (1862). It "is matter of opinion." *Keniston v. Rowe*, 16 Me. 38 (1839); *U. S. v. Collins*, 1 Cranch, C. Ct. 592 (1809).

On the contrary, in North Carolina, where the defence to a bastardy complaint involved evidence that the complainant at a time when the child could have been begotten was habitually having intercourse with a man other than the defendant, evidence that the child resembled the other man is admissible. *State v. Britt*, 78 N. C. 439 (1878).

In Massachusetts, it has been held that the complainant in such a case cannot meet the defendant's evidence of intercourse with another by showing a dissimilarity in personal appearance between the child and the person claimed by the defendant to be the father. *Young v. Makepeace*, 103 Mass. 50, 54 (1869). "Points of dissimilarity, not implying a difference of race, do not tend to disprove paternity." *Ibid.*

RACE, COLOR, ETC.—Many of the infirmative suggestions which pertain to evidence of resemblance from inspection, do not as sug-

gested in *Young v. Makepeace*, *supra*, weaken the force of the more deeply graven facts of race or color. That one person, especially at a very early age, resembles another is often a matter of fancy. Whether a person is white or colored, whether he has a set of features usually found in the African or European races, can frequently be established with small chance of error. A child of white parents, claimed to be illegitimate, may be exhibited to the jury with a view to demonstrating that she is of colored parentage at least on one side. "On general principles it would seem that when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. The eyes of the members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen and not be allowed to see for themselves." *Warlick v. White*, 76 N. C. 175 (1877).

PERSONAL INJURIES.—A plaintiff injured by a defect in machinery may exhibit his wounded hand to the jury. *Indiana Car Co. v. Parker*, 100 Ind. 181, 199 (1884). So of an arm injured by the negligence of the driver of a street railway company, *Mulhado v. Brooklyn City, R. R.*, 30 N. Y. 370 (1864); *Hatfield v. St. Paul, &c. R. R.*, 33 Minn. 130 (1885). So the plaintiff has been allowed to exhibit her injured feet to the jury. *Louisville, &c., R. R. v. Wood*, 113 Ind. 544 (1887); *Edwards v. Common Council*, 96 Mich. 625 (1893). In an action for personal injury to the plaintiff's shoulder requiring amputation, the plaintiff may exhibit to the jury the naked remnant of the arm. "The plaintiff had a right to prove the hurt, and that it had entailed lasting injury by causing the amputation and loss of his arm. He could prove that by oral evidence. He could himself stand before the jury for ocular demonstration of the fact; and why may he not intensify and make more certain the fact by inspection of the naked shoulder itself? It is only more and more conclusive evidence upon a fact, which he was entitled to prove, and, being relevant, we cannot exclude it, because there may have been danger of inspiring sympathy in the jury and increasing damages." *Carrico v. West Virginia, &c., R. R.*, 39 W. Va. 86 (1894). So in an action for personal injuries through mill machinery claimed to be unsafe, the plaintiff's clothes as torn by the machinery are admissible. "We think the admission of such evidence rests in the sound discretion of the court. If the manner in which the plaintiff was injured, or the nature or character of the injury, could be better explained by the production of the torn clothing which the plaintiff was wearing at the time the injury was received, we perceive no reason why such evidence may not be resorted to." *Tudor Iron Works v. Weber*, 129 Ill. 535 (1889).

In an action against a city for personal injuries through a defect in the sidewalk the plaintiff may not only exhibit his injured limb to the jury, but may have it examined by a medical expert in presence of the jury. *Lanark v. Dougherty*, 153 Ill. 163 (1894). In a similar case in Missouri, where the plaintiff, while on the stand, was permitted to exhibit his injured leg to the jury, it is error not to permit the defendant to call experts to examine the limb in presence of the jury with a view to stating, as the result of such examination, their opinion of the condition of the injuries as compared with their condition at a former trial. *Haynes v. Trenton*, 123 Mo. 326 (1894). "When a party in open court voluntarily submits his person to inspection for his own benefit, he confers upon the opposing party a right to the further inspection precisely the same as a party who becomes a witness must submit to cross-examination." *Cole v. Fall Brook Coal Co.*, 87 Hun, 584 (1895). "The rule is well recognized by substantially all the courts of the country that the injured party may exhibit his wounds to the jury, in order to show their nature or extent, and that rule has been followed in this state." *Graves v. Battle Creek*, 95 Mich. 266 (1893).

So in an Indiana case. "The evidence in the cause tended to prove that an incurable disease of the hip joint and curvature of the spine followed as a result of the injuries inflicted by the appellant's servant upon the appellee. During the progress of the trial, a physician was permitted to exhibit to the jury the appellee in his then condition and to place him in different attitudes in order to enable them to determine the extent of his disability." This was held correct. *Citizens' Street R. R. v. Willooby*, 134 Ind. 563 (1893).

The exhibition must be conducted under such circumstances as not to mislead the jury. Therefore, in an action for injuries caused by a dog bite it is error to permit the plaintiff to exhibit the then condition of his limb—three years and four months after the bite—without any testimony tending to show absence of change for the worse. *French v. Wilkinson*, 93 Mich. 322 (1892).

COMPULSORY EXAMINATION.—A conflict of authority exists on the question as to whether a defendant can be compelled by the court to submit his person to an examination of the extent of his injuries.

The opinion that such a power does not exist in the court at common law is strongly contended for by Mr. Justice Horace Gray, speaking for the majority of the United States supreme court in *Union Pacific R. R. v. Botsford*, 141 U. S. 250 (1890). On an action by a female passenger for injuries to the back of her head, rupturing the membranes of the brain and spinal cord, the defendant moved the United States circuit court "for an order

against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence; it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner; the defendant at the same time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition." The court overruled the motion on the ground that they had no authority to make or enforce such an order. This was sustained on writ of error. The court say, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." *Ibid.*

The supreme court of Indiana say, "so far as we know, the courts of this state have never attempted to exercise such a power, and we are of the opinion that no such power is inherent in the courts." *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401 (1891); *Kern v. Bridwell*, 119 Ind. 226 (1889). Until modified by statute, the rule was the same in New York. "The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this state. Its existence is not indispensable to the due administration of justice. Its exercise depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence." *McQuigan v. Delaware, &c., R. R.*, 129 N. Y. 50 (1891). The party may submit, if so disposed, to any examination not indecent. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401 (1891).

Should a party refuse to acquiesce in a reasonable request to

submit his person to examination, it gives rise to the same presumption as refusing to produce any other evidence in his power. "Should a litigant willingly submit, there could be no legal objection to such an examination, and should he refuse to submit to a reasonable examination his conduct might possibly be proper matter for comment, but this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers." *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401 (1891). "If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury, as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power." *Union Pacific R. R. v. Botsford*, 141 U. S. 250 (1890). "It is unknown to our practice and to the law." *Loyd v. Hannibal, &c. R. R.*, 53 Mo. 509 (1873). "The court had no power to make or enforce such an order." *Parker v. Enslow*, 102 Ill. 272 (1882). "This court is committed to that doctrine. We do not think injustice is likely to result to a defendant by a refusal to make such an order, especially when given the full benefit of the fact that the plaintiff has refused to submit voluntarily thereto, as was done in this case." *Peoria, &c., R. R. v. Rice*, 144 Ill. 227 (1893).

"If a party is entitled to the compulsory exhibition of the body of his opponent, it would seem to follow that he might have such examination made before the jury. And the court might require the plaintiff, on the trial and before the jury, to submit to the same examination as is required by this order. . . . We know of no right which this court has to compel a party to submit to any bodily examination." *Roberts v. Ogdensburg, &c., R. R.* 29 Hun, 154 (1883); *Cole v. Fall Brook Coal Co.*, 87 Hun, 584 (1895). The rule has been changed by statute in New York, and such a law has been held not to infringe any of the express or implied restraints upon the legislative power to be found in the federal or state constitution. *Lyon v. Manhattan R. R.*, 142 N. Y. 298 (1894). A very sagacious ruling was laid down in the case last mentioned. "The power conferred by the amendment should never be used in such a way as to leave any doubt as to the fairness and good faith of the proceeding, otherwise it may prove to be a sword instead of a shield. It should be a fair and open inquiry after truth, in which both sides are or may be actors. If it is used only for the purpose of enabling the defendant to prepare expert witnesses to give testimony at the trial it will be hardly possible to keep the fact from the jury, and it is easy enough to see how such an element in the case might be used to excite sympathy, stimulate prejudices, and in some cases possibly to enhance damages." *Ibid.*

COMPULSORY EXAMINATION ORDERED.—The considerations which have induced certain courts in the southern and western states of

America, under the lead of Iowa in 1877, to make orders compelling examinations of the person of the plaintiff in cases of claims for personal injuries, are partly stated in the breezy dissenting opinion of the justices Brewer and Brown in *Union Pacific R. R. v. Botsford*, 141 U. S. 250 (1890). "It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal considerations; and if in other cases in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?" *Ibid.*

The leading case to this effect, above referred to, is *Schroeder v. Chicago, &c., R. R.*, 47 Ia. 375 (1877). The plaintiff was injured, by the alleged negligence of the defendant's employees, in his back and hips. He claimed that these injuries were permanent, had impaired the nervous system to the extent of partial paralysis, especially of the bowels. The application for an examination was refused in the lower court on the ground that the defendant was not entitled, as of right, to the order sought. This was held to be error. The grounds of this ruling in main are: (1) Every party litigant has a right to exact justice, which involves obtaining the entire truth on all matters in issue. (2) A proper examination by skilled physicians would be more apt to do full justice to both parties than any other way. (3) The plaintiff has testimony under his control which reveals the truth more clearly than any other. "The cause of truth, the right administration of the law, demand that he should have produced it." (4) The plaintiff is practically being cross-examined, as he has offered himself as a witness. (5) There is no indignity; as parties assured, pensioners, men enlisting in the army and navy submit to rigid examinations of their bodies. (6) A plaintiff can exhibit, in a case of this kind, his wounds or limbs. (7) The divorce courts have ordered examinations in cases of alleged impotency.

In Nebraska, while the court will order an examination in a suit for personal injuries, the examination must be before the trial and by experts agreed on by the parties or appointed by the court. *Stuart v. Havens*, 17 Neb. 211 (1885).

It cannot be regarded as definitely settled that the courts of

Nebraska will compel such an examination at all. But it is at least definitely settled that "if such an application is proper under any circumstances, it must be made before trial." *Chadron v. Glover*, 43 Neb. 732 (1895).

A precisely reversed ruling has been made in Wisconsin. In that state, an examination may be ordered during the trial and in the presence of the experts of the adverse party. *White v. Milwaukee City R. R.*, 61 Wis. 536 (1884). So also in Kansas, *Atchison, &c. R. R. v. Thul*, 29 Kans. 460 (1883). In *Schroeder v. Chicago, &c. R. R.*, 47 Ia. 375 (1877) the application was made at the trial and before evidence was gone into, and the motion was for a board of physicians appointed by both parties. In Ohio, "in an action to recover for personal injuries caused by the negligence of the defendant, the court has power to require the plaintiff to submit his person to an examination by physicians and surgeons, when necessary to ascertain the nature and extent of the injury." *Miami Turnpike Co. v. Baily*, 37 Oh. St. 104 (1881). In Texas the court ordered an examination out of court, but upon the plaintiff objecting to one of the defendant's doctors on personal grounds, and the other declining to go on alone, refused to stop the case or compel the plaintiff to be examined by the two doctors suggested by the defendant. *Missouri, &c., R. R. v. Johnson*, 72 Tex. 95 (1888). "If this power should be exercised at all, it should be by the appointment by the court of one or more disinterested experts, either of its own selection or such as may be agreed upon by both parties." *Ibid.* The question of the court's power was regarded as an open one in *Gulf, &c., R. R. v. Nelson*, 5 Tex. Civ. App. 387 (1893). The power to compel an examination is asserted in *Georgia. Richmond, &c., R. R. v. Childress*, 82 Ga. 719 (1889). And in *Alabama. Alabama, &c., R. R. v. Hill*, 90 Ala. 71 (1890). The rule is the same in Nebraska. *Stuart v. Havens*, 17 Neb. 211 (1885). And in Michigan it has been held error to refuse to request a female plaintiff to remove her glove from an injured hand. "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court, under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury." *Graves v. Battle Creek*, 95 Mich. 266 (1893). But on an action for breach of warranty on the sale of a horse the court has no power to order that the defendant have the privilege of sending a veterinary surgeon into plaintiff's stable to examine the horse.

"The court had no power to compel the plaintiff to submit to such an invasion of his premises." *Martin v. Elliot* (Mich.), 63 N. W. 998 (1895).

The courts of Missouri after at first deciding that such an order could not be made (*Loyd v. Hannibal, &c.*, R. R., 53 Mo. 509 (1873),) subsequently reversed their position, and now hold that they will order the submission. *Shepard v. Missouri, &c.*, R. R., 85 Mo. 629 (1885); *Sidekum v. Wabash, &c.*, R. R., 93 Mo. 400 (1887); *Owens v. Kansas City, &c.*, R. R., 95 Mo. 169 (1888).

In Arkansas, the rule is laid down as follows:—"Where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled as a matter of right, to have the opinion of a surgeon upon his condition—an opinion based upon personal examination." Where the evidence of experts is abundant, the court may, however, refuse an order. *Sibley v. Smith*, 46 Ark. 275 (1885). But where the defendant requested that the plaintiff should be examined by experts in open court, the judge at *nisi prius* overruled the motion, but required him to submit to an examination at his own home before certain physicians representing both sides and passed upon by the court. This was held correct. "It is within the sound discretion of the circuit court to order such an examination, or not, and to direct whether it should be made in court or not; and the court will not control the exercise of that discretion, unless its exercise is abused." *St. Louis, &c.*, R. R. *v. Dobbins*, 60 Ark. 481 (1895).

ORDER IS DISCRETIONARY. — The order is discretionary with the court. *White v. Milwaukee, &c.*, Ry., 61 Wis. 536 (1884); *Miami, &c.*, Turnpike Co. *v. Baily*, 37 Oh. St. 104 (1881). Where an application was not made until the close of the plaintiff's case, the application can be refused on that ground. *Ibid.* "It is evident from the very nature of things that the propriety of such an order must usually rest largely in the discretion of the trial court, and it could only be in case of a plain abuse of such discretion that we would interfere." *Hatfield v. St. Paul, &c.*, R. R., 33 Minn. 130 (1885). "And we are by no means prepared to say that there may not be circumstances where the defendant would not have the right to such an order." *Ibid.* "We decide simply that the power exists, and that in each case it is to be exercised or not, according to the sound discretion of the presiding judge." *Richmond, &c.*, R. R. *v. Childress*, 82 Ga. 719 (1889); *Southern Bell Telephone Co. v. Lynch*, 95 Ga. 529 (1894). "It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused." *Shepard v. Missouri, &c.*, R. R., 85 Mo. 629 (1885), where the plaintiff offered to submit her person to the examination of one physician, but not of three. The court can refuse an application "for the time being," reserving to

the defendant the right to apply later. Unless this is done the prior application may be treated as waived. *Sidekum v. Wabash, &c. R. R.*, 93 Mo. 400 (1887). Possibly the action of the court was affected in that case by the fact that the defendant asked that the plaintiff, a lady, submit her injuries, largely displacement of the womb, to the examination of four surgeons, and was taken in view of the action of the court in *Shepard v. Missouri, &c., R. R. (ubi supra)*. "The real question here is, whether there has been an abuse of the discretion lodged in the trial court." *Owens v. Kansas City, &c. R. R.*, 95 Mo. 169 (1888). Where the plaintiff had exhibited an injured arm to the jury, and three physicians had testified with regard to it, it was held no error for the court to overrule the defendant's motion for an order compelling the plaintiff to submit his arm to four physicians selected by the defendant. *Stuart v. Havens*, 17 Neb. 211 (1885).

The supreme court of Georgia suggest as reasonable preliminaries to the exercise of this power that the plaintiff should first be asked to submit voluntarily, and his refusal proved in case of an application for an order; as well as the probability of results important to the cause of justice being elicited; the experts should be selected by the court rather than the party or parties. "It is likewise obvious that all the expenses should be borne by the party at whose instance the examination is made." *Richmond, &c., R. R. v. Childress*, 82 Ga. 719 (1889). This was substantially followed in *Alabama, &c., R. R. v. Hill*, 90 Ala. 71 (1890).

The effect of the authorities on the matter of discretion is thus summed up by the supreme court of Alabama. "It is apparent from the adjudged cases, that the statement of the rule as to the revision of the trial court's action on a motion of this sort, to the effect that such action will not be interfered with unless it involves a manifest abuse of discretion, is inapt and misleading. What is really meant—the rule fairly deducible from the opinions—is, that if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error." *Alabama, &c., R. R. v. Hill*, 90 Ala. 71 (1890). The court then proceed to ask, "Was it essential to the ends of justice that plaintiff should submit to this examination. We think it was, and grant a new trial for the failure of the trial court to order the examination. *Ibid.* The rule in Arkansas is similar. "In refusing to order the examination, as it may do when the evidence of experts is already abundant, the circuit court must exercise a sound discretion; and its action is subject to review in case of abuse. There could not be a more flagrant instance of the evils resulting from such a refusal than the present case affords." *Sibley v. Smith*, 46 Ark. 275 (1885).

The supreme court of Kansas, however, speak of the order compelling inspection in actions for permanent personal injuries as a matter of right, though giving the court a discretion to reject it if cumulative evidence only would be secured thereby, or the evidence would be otherwise objectionable on general principles. The court is also given a discretion in prescribing details, &c. "We would think that the defendant in a case like the present would be entitled as a matter of right, upon a proper application and upon a proper showing, to have an order made by the court compelling the plaintiff to submit himself to a personal examination, for the purpose of ascertaining the nature, character, extent and permanence of his injuries; but of course the court should exercise a sound judicial discretion in making such an order. The right to the order, being founded upon necessity, would not of course extend beyond the necessities of the case." *Atchison, &c., R. R. v. Thul*, 29 Kans. 466 (1883).

So the supreme court of Iowa assert that the defendant has a right to demand an examination. *Schroeder v. Chicago, &c., R. R.*, 47 Ia. 375 (1877). But the conditions of the examination as to time, examiners, &c., is in the discretion of the court. *Ibid.*

HOW ENFORCED. — The method of enforcing an order for an examination of personal injuries of a permanent nature is somewhat differently suggested by those who assert the power of the court to issue such an order. The dissenting justices in *Union Pacific R. R. v. Botsford*, 141 U. S. 250 (1890), one of whom (Brewer) was a member of the court which decided *Atchison, &c., R. R. v. Thul*, 29 Kans. 466 (1883), say that refusal to try the order is not a contempt, and suggest that "such an order may be enforced by staying the trial or dismissing the case." In *Schroeder v. Chicago, &c., R. R.* 47 Ia. 375 (1877), the court say that the power of the court "was amply sufficient to coerce obedience." The witness being in contempt, he would be treated as a recusant witness. If the recusancy were persisted in, "the court could have stricken from the pleadings all the allegations as to permanent injury, and withdrawn from the jury that part of the case. The plaintiff by voluntarily withdrawing his claim for such injury would have been relieved from the necessity of submitting to the examination, and proceedings as for contempt would have been suspended." This language is cited with approval in *Atchison, &c., R. R. v. Thul*, 29 Kans. 466 (1883). "On the refusal of the plaintiff to comply with such order, when properly made, the court may dismiss the action, or refuse to allow the plaintiff to give evidence to establish the injury. . . . Authority to exclude the evidence arises out of the inherent power of the court over the subject under investigation." *Miami, &c., Turnpike Co. v. Baily*, 37 Oh. St. 104 (1881).

"Certainly, if the court can make the order, it will have no difficulty in enforcing it. Not that it can compel the party to submit to a personal examination, but it may dismiss a plaintiff's suit for a persistent refusal to do so; or, in case of either defendant or plaintiff, treat it as a suppression of testimony, and so present the matter to the jury as to make the refusal equivalent to proof of the fact, which the party asking such personal examination would make it probable, by affidavit or otherwise, the examination would disclose. *Shepard v. Missouri, &c.*, R. R. 85 Mo. 629 (1885).

Power to enforce such an order is frequently conferred by statute. *Richmond, &c., R. R. v. Childress*, 82 Ga. 719 (1889).

EXPERIMENTS IN COURT. — A peculiarly cogent method of proving a fact is to test its existence by an experiment in open court. The evidence so furnished is frequently real evidence, properly so called.

For example, in a Massachusetts case, in an action to recover the price of a suit of clothes which it was claimed did not fit, "while the defendant was testifying, the plaintiff produced the clothes in court, and requested the defendant to try them on in the presence of the jury. The defendant assented, and, having put them on, wore them in the presence of the court and jury. The plaintiff then called several tailors as experts, who testified that the clothes needed some alterations before they could be called a good fit, but that such alterations could be easily made without injury to them." *Brown v. Foster*, 113 Mass. 136 (1873). Where the evidence was uncontroverted, in an action for personal injuries, that the female plaintiff limped, the court declined to compel her to walk across the court-room in presence of the jury at the defendant's request. *Hatfield v. St. Paul, &c.*, R. R., 33 Minn. 130 (1885). The general right of the court to order such an exhibition is, however, insisted on. "As the object of all judicial investigations is, if possible, to do exact justice and obtain the truth in its entire fulness, we have no doubt of the power of the court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. The practice in patent and in certain equity cases, of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases." *Ibid.*

The American courts have shown themselves unwilling to consent to the use of experiments in court where the circumstances

were such as to lead to a suspicion that evidence was being fabricated by this means. Thus where a colored defendant on an indictment for larceny in a corn-field was claimed to have a peculiar foot, with which a government witness connected certain foot-prints found in the cornfield on the occasion of the larceny, the court permitted the defendant to exhibit his feet to the jury and walk barefooted on the sawdust floor of the court room, but declined to allow him to walk on the open ground in presence of the jury or to have soil similar to that of the corn-field brought into the court room for the same purpose. Though the defendant objected to the refusal, it was held to be "at the option of the court to permit or not the same experiment to be made on mellow earth, either in or out of the courthouse, within view of the jury, for their information. . . . In the present case, it could not be very material that the defendant should be permitted to make tracks for exhibition to the jury; for the peculiarity of his ordinary tracks might be caused by some habitual trick of motion in his gait, which he would take pains on such an occasion to avoid." *Campbell v. State*, 55 Ala. 80 (1876).

In a case where certain masked burglars broke and entered a dwelling house for the purpose of extorting from the cashier of a bank the combination of the lock in the bank vault, the cashier testified that he identified the defendant as one of the gang by means of his voice — which was peculiar. On cross-examination, he was asked to state the peculiarity. Being unable to do so, the defendant's lawyer asked the defendant to stand up and repeat something, which he did. Whereupon the witness said that the defendant was suppressing his voice. On the defendant being asked "to speak it right out," the judge interposed the suggestion that this was not competent. The counsel for the defendant contended that he had a right to have the peculiarities of the defendant's voice pointed out by the witness, and that for that purpose the voice itself was competent to be introduced. The judge ruled otherwise, and was sustained. "His manner of speaking being in question, there was no way of determining whether he would use his voice in the court room in his natural or in a constrained and simulated manner, the genuineness of the voice used not being supported by his oath." *Com. v. Scott*, 123 Mass. 222 (1877).

A distinction is to be drawn between *experiments* made in court, the results of which, to act as evidence, should be obtained during the stages of the trial at which evidence is admissible, and *illustrations* which may be used merely to enforce an argument. Thus in an action against a railroad company for land damages, counsel may illustrate his argument that it is an injury to a mill power to lessen the "head" of water, by demonstrating "by appliances provided for the purpose and not previously exhibited in evidence . . .

that of two columns of water of the same diameter but of different heights, the higher would discharge more quickly and with greater power than the lower." *Hoffman v. Bloomsburg, &c., R. R.*, 143 Pa. St. 503 (1891).

EXPERIMENTS OUT OF COURT. — The rule relating to experiments in court has nothing to do with a somewhat similar rule that the court may permit witnesses to state the result of experiments made out of court, the results of which are relevant to the issue.

Thus on an indictment for a rape committed upon a woman said to be of weak physical condition, to prove the comparative strength of the prisoner, the government was allowed to show "that he had taken a barrel of flour up in his hands before him and carried it several rods, and then down several stairs or steps into a cellar; also, that he had within a few years carried a barrel of sugar some ten rods on his shoulder and then set it down on a platform," and that he "seemed to carry them easily." *State v. Knapp*, 45 N. H. 148 (1863). Other witnesses were allowed to testify in the same case as to similar experiments testing their own strength, and the results of "scuffles" between them and the prisoner. *Ibid.*

VIEW. — It is discretionary with the court to permit the jury to visit any locality involved in the case. Facts so learned are real evidence. *People v. Buddensieck*, 103 N. Y. 487 (1886).

Though the granting of a view is in the discretion of the court, which will not ordinarily be reviewed on appeal, error in law may be committed by the court in instructing the jury as to the effect they may give to the facts learned in that way. *Boardman v. Westchester, &c., Ins. Co.*, 54 Wis. 364 (1882). For example, where the jury were informed that the opinions of witnesses in a land damage case as to the value of the land were not to control their own opinion gained by a view of the premises, the court held it to be error. *Hoffman v. Bloomsburg, &c., R. R.*, 143 Pa. St. 503 (1891). In that case, the court cite with approval, and adopt the language of a previous ruling (*Flower v. Baltimore, &c., R. R.*, 132 Pa. St. 524 (1890)), that an instruction to the jury that "You are only permitted to view the land, that you may better understand the testimony. The value of the land you are to ascertain from the witnesses" is a correct statement of the law. "The jurors were sworn," the court say in *Flower v. Baltimore, &c., R. R.*, "to render a true verdict according to the evidence. It was never intended that the view of the jury should be substituted for the evidence, and that they should make up their verdict from the view in disregard thereof. The object of the view is, as was correctly said by the learned judge, to enable them the better to understand the testimony; to weigh conflicting testimony, and, thus aided, to arrive at a sound and just conclusion." *Ibid.* Probably,

however, this is not a complete statement of the law. In Massachusetts, in an action for personal injuries, where it was contended for the plaintiff, that the court could not grant a new trial on the ground that the verdict was against the weight of evidence where the jury had had a view, the court say: "In many cases, and perhaps in most, except those for the assessment of damages, a view is allowed for the purpose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case." *Tully v. Fitchburg, R. R.*, 134 Mass. 499 (1883).

So in a criminal case, *State v. Knapp*, 45 N. H. 148 (1863), where the view was granted of the locus in which the offence was said to have been committed, the jury were sent "to view the premises, in charge of the high sheriff, accompanied by one agent on each side, such as each party chose to select, under proper directions from the court, to the officer, the jury, and the agents, as to how the view should be conducted. One of the counsel on both sides went as agents with the jury." So also in *Com. v. Webster*, Pam. (Bemis Ed.), 31, 32, 46 (1850).

The court may decline to order a view, especially if satisfied of the accuracy of the photograph taken at the time of an accident. *People v. Buddensieck*, 103 N. Y. 487 (1886).

The view, if granted, must be under conditions prescribed by the court or by law. Accordingly, where certain jurors in a capital case after the close of the evidence, while walking out for exercise by leave of court and in charge of an officer, visited and examined the place where the homicide occurred, and in regard to which the witnesses had testified, it was held to be a sufficient reason for granting a new trial. "It is a well settled rule that if a jury, after a case is submitted to them, receive any kind of evidence which can have the most remote bearing upon the case, it will be fatal to their verdict." *Eastwood v. People*, 3 Parker, Cr. R. 25, 52 (1855).

The accused is entitled in a criminal case to be confronted with the witnesses against him, and this rule applies to the evidence furnished by a view. On an indictment for burglary the judge directed the jury, in the absence of the defendant, to inspect the premises where the alleged burglary was committed. He directed a witness for the state to accompany them and point out the places marked on a certain diagram of the premises. Held error. "Why such proceedings were permitted, we are not informed, and cannot imagine." *State v. Bertin*, 24 La. Ann. 46 (1872).

IN CRIMINAL CASES. — There is no necessity of proving to the jury what they can see for themselves. Where a defendant was

described in an indictment as a "colored person," this allegation is sufficiently proved by *profert*, if the jury are satisfied of the fact on inspection. "It would not be necessary to prove by other testimony than *profert* of the party that he was 'a person,' or a 'man,' if so described in the indictment. Under certain circumstances jurors may use their eyes as well as their ears." *Garvin v. State*, 52 Miss. 207 (1876). So the court and jury can judge from inspection whether a prisoner is over fourteen. *State v. Arnold*, 13 Ired. 184 (1851); *Com. v. Emmons*, 98 Mass. 6 (1867).

On a complaint for *knowingly* suffering a female under the age of twenty-one years to resort to the defendant's premises for purposes of prostitution, the jury may judge from inspection of the girl as to the defendant's knowledge. "If the subject of the *scienter* in this case had been that Bertha was a *girl*, as well as under the age of twenty-one years, and the question had been whether the defendant knew her to be a girl, her appearance alone would be satisfactory, without question. The evidence in this case, in a degree, is very much of the same character." *Hermann v. State*, 73 Wis. 248 (1888).

So on a trial for murder the government was permitted to exhibit to the jury the backbone of the deceased, — though the dramatic effect of such an exhibition might naturally be apprehended by the accused. "It served to show to the jury the attitudes and relative positions of the parties when the shot was fired. It was not an unnecessary parade of the bones of the dead man to excite prejudice against his slayer, but was legitimate and proper evidence, and a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded from their consideration." *State v. Weiners*, 66 Mo. 13 (1877). So where the admission of a section of the ribs and vertebræ were given in evidence and excepted to "on the ground that it was calculated to inspire the jury with such horror as to influence their verdict," the court say, "It was introduced for the purpose of showing the direction and lodgment of the ball, and was clearly admissible." *Turner v. State*, 89 Tenn. 547 (1890).

So of a pistol by means of which a homicide was caused. "We can see no objection to the pistol being exhibited to the jury and inspected by them, with testimony as to its appearance, how it was fired, the indentations or marks upon the cartridges indicating whether any, or how many barrels had been snapped, and everything about it as it was when the difficulty closed." *Wynne v. State*, 56 Ga. 113 (1876).

So where the case turned on the identity of a deceased person who had lived under different names at different places, various letters, hotel registers, and other documents showing a similarity

in handwriting of the two men (supposed to be the deceased under an *alias*) may be examined by the jury in their consultation room. *Udderzook v. Com.*, 76 Pa. St. 340 (1874). The bloody clothes in which homicide is alleged to have been committed may be exhibited to the jury. *Drake v. State*, 75 Ga. 413 (1885); *People v. Gonzalez*, 35 N. Y. 49 (1866); and the clothing worn by the deceased at the time of a fatal affray may be "produced in evidence before the jury." *Levy v. State*, 28 Tex. App. 203 (1889); *Gardiner v. People*, 6 Parker, C. R. 155 (1866).

"In criminal cases a jury may form their opinion as to the genuineness of a document, alleged to be forged, by a comparison of it with other writings admitted or proved to be genuine." *Garvin v. State*, 52 Miss. 207 (1876). And may be aided in so doing, by the use of magnifying glasses. *Indiana Car Co. v. Parker*, 100 Ind. 181, 200 (1884).

Exhibition to the jury of clothes, weapons, &c., belonging to the prisoner, is not objectionable as compelling a person accused of crime to furnish evidence against himself. *Drake v. State*, 75 Ga. 413 (1885). Where it was claimed by a prisoner that the deceased came to her death by the clothes accidentally catching fire, and that she (the prisoner) had burned her own hand in a vain attempt to save deceased, the court compelled her, against objection, to remove the bandages on the hand alleged to be injured. It proved entirely free from any indication of a burn. This was held, no error. *State v. Garrett*, 71 N. C. 85 (1874).

It has been held that in a criminal case, to establish the identity of the prisoner, he may be compelled by the court to bare his arm to the jury and exhibit certain tattoo marks which were testified to a witness, and that such a course is not compelling the prisoner "to be a witness against himself." *State v. Ah Chuey*, 14 Nev. 79 (1879).

CIRCUMSTANTIAL EVIDENCE. — Frequently in criminal cases requiring the use of circumstantial evidence, many of the links in the chain of proof or evidence bearing on them can be produced for the inspection of the jury. Where a clerk was killed by burglars while resisting arrest, a rocket-drill found in the prisoner's possession and fitting the bits with which entrance to the store was effected, may be exhibited to the jury. *Ruloff v. People*, 45 N. Y. 213, 224 (1871).

In *Com. v. Webster*, 5 Cush. 295 (1850), where the body of the deceased had been, it was claimed, mutilated and partly burned by the prisoner, artificial teeth found in the privy vault of the prisoner, and alleged to have been those of the deceased, were produced in court and fitted to the plaster cast made for the mouth of the deceased; a letter obviously written in a peculiar style and by the use of an unusual instrument was compared in court with a

small stick tipped with cotton found in the prisoner's possession. Bemis Report, pp., 80, 81, 204, 205, 208, 210.

On an indictment for the murder of one Mulock by blows on his head, inflicted with a musket, the court held that no error had been committed in permitting "the district attorney to produce in court and show to witnesses, in the presence of the jury, the hat and gun found near Mulock's dead body, or a watch it was claimed Mulock had on his person the morning he disappeared, or any other article found on or near his dead body, or in permitting the district attorney to produce Mulock's skull in court. . . . It was also proper . . . to allow Dr. Wey to examine the skull of Mulock in court, with the broken gun that was found beside Mulock's dead body, and explain the fractures in the skull and the marks on it to the jury, and to show them how nicely parts of the gun-lock and sight on the gun fitted the indentations or fractures in the skull." *Gardiner v. People*, 6 Parker's C. R. 155, 201 (1866).

The decision that on a prosecution for selling liquor to a minor, the jury are not entitled to judge of the minor's age by his appearance seems hardly in accordance with the current of the decisions. *Ihinger v. State*, 53 Ind. 251 (1876).

ADMISSION FREQUENTLY DISCRETIONARY. — The admissibility of real evidence is frequently in the discretion of the court. The court may exclude such evidence when, in its opinion, it is too remote or trivial to be of sufficient advantage to the decision of the case. On an action for the price of a large consignment of Swiss cheeses, the quality of which was in dispute, the court refused to permit any of the cheese to be exhibited to the jury because of the difficulty of agreeing on samples which the deterioration in the interval and the bulk of the whole consignment presented. *Hood v. Bloch*, 29 W. Va. 244, 255 (1886). Such evidence may be excluded where the decency, morals, or sensibilities of the community would be shocked by the exhibition offered. Probably a pregnant woman would not be allowed to prove that fact by exposing herself to the jury. *Warlick v. White*, 76 N. C. 175 (1877).

The defendant in an action for personal injuries to a young woman by alleged breaking of her ribs "offered in evidence a section of a human body which he claimed would show the character and relative position of the bone and cartilage constituting the human ribs, and the manner in which the bone and cartilage are joined together, and joined to the breast-bone; which the surgeon testified that he had cut from the body of a woman about the size and age of the plaintiff." The court rejected the evidence. "The exhibit being of doubtful utility and offensive in its nature, we think the court might well exercise its discretion." *Knowles v. Crampton*, 55 Conn. 336 (1887).

The court probably cannot reject evidence simply because it is

offensive, either to the sight or the intelligence. But if other evidence is available, the court has a discretion to exclude — which it is usually not slow to exercise. *Knowles v. Crampton*, 55 Conn. 336 (1887). “In matters of discretion the action of the trial court is not subject to review.” *Knowles v. Crampton*, 55 Conn. 336 (1887).

By “discretion,” in this connection, can hardly be meant that the admission of real evidence is dependent upon the whim of a particular judge. That this class of evidence can be rejected when irrelevant, remote, misleading, or, indeed, objectionable upon any ground which gives the court a right to reject personal evidence is clear. But that relevant evidence, not excluded by some general rule, can legally be excluded because its source is *real* when the same evidence, if given by witnesses, would be admitted, has not been decided.

“It is not true, as a rule of law, that evidence is incompetent merely because it is inconclusive. It is ordinarily admissible, if the fact sought to be proved is itself relevant to the issue, and if the proposed proof legitimately tends to establish it.” *People v. Gonzalez*, 35 N. Y. 49, 62 (1866). It is not perceived that the rule differs in this respect between real and personal evidence.

CANNOT BE REPORTED. — The fact that real evidence cannot in many, perhaps in most, instances be reported to the appellate court is a characteristic feature of this class of evidence.

Appellate courts have felt inclined to regard this circumstance in various ways. It has frequently been held that as the appellate court cannot have the benefit of certain real evidence — for example, the appearance of the witnesses — it should be cautious in upsetting findings made upon conflicting testimony.

But in a case where, the jury having had a view, the contention was made that as the facts obtained through a view are evidence which the court did not have, no new trial could be granted, the rule was laid down that, even under the circumstances stated, the court could still grant a new trial if the judge decides that “he is so far in possession of all the material evidence as to act intelligently.” *Tully v. Fitchburg, R R.*, 134 Mass. 499 (1883).

Other courts have insisted that they have the right to review findings of fact and, by consequence, a finding based upon real evidence may deprive a party of his rights upon appeal. *Stephenson v. State*, 28 Ind. 272 (1867); *Ihinger v. State*, 53 Ind. 251 (1876).

CHAPTER II.

HEARSAY.

§ 567.¹ As evidence afforded by our own senses is seldom attainable in judicial trials, the law is satisfied with requiring the next best evidence, namely, the testimony of those who can speak from their own personal knowledge. It is not, indeed, requisite that the witness should have personal knowledge of the main fact in controversy; for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is in general necessary that a witness should only be permitted to speak to such facts only as are within his own knowledge, whether they be things said or done, and that he should not testify from information given by others, however worthy of credit they may be. It is, too, indispensable to the proper administration of justice,—first, that every witness should give his testimony under the sanction of an oath, or its equivalent, a solemn affirmation,—and secondly, that he should be subject to the ordeal of a cross-examination by the party against whom he is called, so that it may appear, if necessary, what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth. And testimony from the relation of third persons cannot, even where the informant is known, be subjected to either of these tests. It has been well observed that, “If the first speech were without oath, another oath that there was such speech makes it no more than a mere speaking, and so of no value in a court of justice.”² Besides, it is often impossible to ascertain through whom, or how many persons, the original narrative has been transmitted. Evidence of this sort constitutes that sort of second-

¹ Gr. Ev. § 98, in great part.

² B. N. P. 294, b.

hand evidence which is termed hearsay; a species of proof which, with a few exceptions that will be presently noticed, cannot be received in judicial investigations.¹

§ 568. The rule excluding such evidence has been recognised in England as a fundamental principle ever since the time of Charles the Second.² It even applies in cases where no other evidence can possibly be obtained. For example, a statement not on oath, even by a dead man who was the only eye-witness of a transaction, is inadmissible;³ and on indictments for ravishing children, too young to be admissible witnesses, statements made by the children to their mothers shortly after the offence was committed cannot be received in evidence.⁴ Where a servant was indicted for perjury, in saying that her deceased mistress had never had a child, declarations of the mistress were rejected as evidence for the Crown.⁵

¹ The rule excluding hearsay evidence, or rather the mode in which that rule is frequently misunderstood in courts of justice, is amusingly caricatured by Dickens:—

“‘I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up if you please, Mr. Weller.’

“‘I mean to speak up, sir,’ replied Sam. ‘I am in the service o’ that ’ere gen’l man, an wery good service it is.’

“‘Little to do, and plenty to get, I suppose?’ said Serjeant Buzfuz, with jocularity.

“‘Oh, quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes,’ replied Sam.

“‘You must not tell us what the soldier, or any other man, said, sir, interposed the judge, ‘it’s not evidence.’

“‘Wery good, my lord,’ replied Sam.” See the account of Bardell *v.* Pickwick in the *Pickwick Papers*, at p. 367.

² One of the earliest cases in which the rule was acted upon is *Sampson v. Yardley*, 1667.

³ 1 Ph. Ev. 209. In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent wit-

ness: 1 Dickson, *Ev. Sc.* 66, 67; *Dysart Peer.* (H. L.), 1881, where the extent of, and exceptions to the rule are discussed at some length. It seems that even where the relation has been handed down to the witness at second hand, and through several successive relators, each only stating what he received from the intermediate relator, it will still be admissible, if the original and intermediate relators are all dead, and would have been competent witnesses if living: *Tait, Ev.* 430, 431; but see 1 Dickson, *Ev.* 70. The reason for receiving hearsay evidence in cases where, as is often the case in Scotland, the judges determine upon the facts in dispute, as well as upon the law, is stated and vindicated by Sir J. Mansfield, in the *Berkeley Peer.*, 1811. Even in English courts, hearsay evidence is often admitted and acted upon in affidavits, which are submitted to the judges only.

⁴ *R. v. Brasier*, 1779; *R. v. Nicholas*, 1846 (*Pollock, C.B.*). The fact that the witness made a complaint is admissible. See post, § 580. And the late Willes, J., used to admit the further question whether, in making the complaint, any name was mentioned, but this appears incorrect. See *R. v. Wink*, 1834, post, note to § 581.

⁵ *Heath’s case*, 1744. In an action

Moreover, a declaration, though made on oath, and in the course of a judicial proceeding, cannot be received, if the *litigating parties are not the same*; because, in such case, the party against whom the evidence is offered, has had no opportunity of cross-examining the declarant.¹

§ 569. The rule excluding hearsay evidence will even shut out proof of *declarations in disparagement of his own signature made by a deceased subscribing witness* to a deed or will.

§ 570.³ The term *hearsay* is used in law with reference to what is *done* or *written*, as well as to what is spoken. In its legal sense "hearsay" evidence is all evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.⁴ Such evidence is rejected not only because it is not given upon oath, because it cannot be tested by cross-examination, and because it supposes some better testimony, which might be adduced in the particular case, but also because of its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness,⁵ its incompetency to satisfy the mind as to the existence of the fact, and because of the frauds which might be practised with impunity under its cover.⁶

§ 571. Nevertheless, the rule excluding hearsay evidence (though in general admirably calculated for trials before popular tribunals) may in particular instances work considerable injustice. For example, on a question respecting the competency of a testator, the conduct of his family or relations taking the same precautions in his absence as if he were a lunatic, or his election in his absence to

of ejectment, where the same question was in issue, and the words charged as perjury were uttered, such evidence was admitted, as relating to a matter of pedigree: see *Annesley v. D. of Anglesea*, 1743 (Ir.).

¹ *R. v. Nuneham Courtney*, 1801; *R. v. Ferry Frystone*, 1801; *R. v. Abergwilly*, 1807; *Mima Queen v.*

Hepburn, 1813 (Am.).

² See *Stobart v. Dryden*, 1836, where the matter was much discussed; and it was pointed out by the Court that the party adversely affected had not had any opportunity of cross-examination.

³ Gr. Ev. § 99, in great part.

⁴ 1 Ph. Ev. 185.

⁵ "Pluris est oculatus testis unus, quam auriti decem;
Qui audiunt, audita dicunt, qui vident, planè sciunt."

PLAUT. *Trucu.* Act 2, sc. 6, l. 8, 9.

⁶ Per Marshall, C.J., in *Mima Queen v. Hepburn*, 1813 (Am.);

Davis v. Wood, 1816 (Am.); *R. v. Eriswell*, 1796.

some high and responsible office, or the conduct of a physician who permitted him to execute a will, are facts which, though affording cogent *moral* evidence, are inadmissible as evidence in a court of law, because when considered with reference to the matter in issue, they appear to be mere statements expressed in the language of conduct instead of the language of words, and consequently, in fact, only "hearsay."¹ Again, on a question of seaworthiness, the fact that a deceased captain, after examining every part of the vessel, embarked in it with his family, is (for similar reasons) not legal evidence on a question as to the vessel's seaworthiness;² neither, in an action to recover for the loss of insured property, is the fact that other underwriters have paid on the same policy,² nor, on a question of when an act of bankruptcy was committed, and the title to goods arose, is evidence that after the issuing of a fiat, certain creditors of the bankrupt returned to his assignees goods which they had received from the bankrupt previously to the date when he delivered other goods to the defendant.³

§ 572. In the instances given above, as illustrating the occasional inconvenience of the rule, the evidence rejected amounted to something more than the mere *declarations* of parties not examined on oath, nor subjected to cross-examination; for these declarations were accompanied *by acts done* in confirmation of their sincerity, and, as such, the evidence was, morally speaking, entitled to great weight. They were the more entitled to consideration, because if an act done be relevant to the issue, and therefore evidence per se, any declarations accompanying that act are—as we shall presently see⁴—admissible for the purpose of illustrating, qualifying, or completing it. Where, however (as in these instances), the act is in its own nature irrelevant to the issue, if the declaration be per se inadmissible, the union of the two cannot render them evidence.⁵

§ 573. This question was much discussed in a case⁶ which was tried four times, where the title to property depended upon the

¹ Wright v. Doe d. Tatham, 1837 (Parke, B., Vaughan, J.).

² 7 A. & E. 387, 388.

³ Backhouse v. Jones, 1839. See, also, Gresham Hotel Co. v. Manning, 1867, Ir.

⁴ Post, §§ 583 et seq.

⁵ 7 A. & E. 361; 4 Bing. N. C. 498. See Gresham Hotel Co. v. Manning, 1867, Ir.

⁶ Doe d. Tatham v. Wright, 1837.

competency of a testator to make a will. The House of Lords (agreeing with the opinion of the majority of the judges, who were divided as mentioned post, in note² at end of this section) finally decided, that letters addressed to a person, whose sanity is the fact in question, are inadmissible to show that he was sane, though the writers were since dead, and the party was addressed as an intelligent man, unless such letters can be connected by evidence with some act done by such deceased in relation thereto. A great majority of the learned judges also thought that the mere fact of finding such letters, many years after they were written, with the seals broken, in company with other papers which bore indorsements in the testator's handwriting, in a cupboard under his bookcase in his private room, was insufficient to raise an inference that they had been read, understood, or acted upon by him, because although letters, found in such a situation, would undoubtedly be evidence against a party criminally accused or civilly charged—since it is a *primâ facie* presumption of law that every man is of sound mind, and it would therefore be assumed that the deceased had appreciated the letters¹—yet that to act upon this presumption in a case where the capacity of the party is the very matter in controversy, would be to argue in a circle. It would, in fact, be to argue thus:—because the testator had sufficient ability to transact business, the inference arises that he read and understood the letters; and because he read and understood the letters, therefore the inference arises that he had sufficient ability to transact business.²

§ 574. If, indeed, the testator, in the case just mentioned, had himself indorsed these letters, or if any direct and positive evidence

¹ See 7 A. & E. 369 (Gurney, B.); id. 376 (Bosanquet, J.); 4 Bing. N. C. 531 (Alderson, B.).

² See 7 A. & E. 391 (Parke, B.); 4 Bing. N. C. 545 (id.); id. 531 (Alderson, B.); id. 502, 504 (Coleridge, J.); id. 525, 526 (Patteson, J.). The letters rejected in this case were three. 1st. A letter of gratitude to the testator from a clergyman to whom he had formerly given preferment; 2nd. A letter of friendship from a relative, with whom the testator was proved to have corre-

sponded three years afterwards; 3rd. A letter advising the testator to direct his attorney to take steps in a transaction with a certain parish. This letter was indorsed by the attorney, who was long since deceased. Three of the judges considered that all the letters were admissible, six thought that the last was. The remaining judges, including Lords Brougham, Lyndhurst, and Cottenham, held that all the letters were alike inadmissible.

had been given to show that he had, whether by act, speech, or writing, manifested a knowledge of their contents, the letters could not have been rejected, or in any way withdrawn from the consideration of the jury; for although they would then have been admitted solely on the technical ground that they explained and illustrated his conduct, no rule of law could have prevented them from operating with full effect upon the minds of the jury, as showing the unbiassed opinions of the writers, and in what manner the testator had been treated by them.¹

§ 575. The Probate Division is now bound by statute to recognise the rules of evidence observed in the other Divisions of the High Court,² and would therefore appear to be bound to follow the decision in the case just mentioned.³

§ 576.⁴ It does not follow that, because the writings or words in question are those of a third person not under oath, they are therefore to be considered as "*hearsay*." On the contrary, it often happens that the very fact in controversy is, whether certain things were written, or spoken, and *not* whether they were *true*; and at other times the oral or written statements tendered in evidence may be the natural or inseparable concomitants of the principal fact in controversy.⁵ In either of these cases it is obvious that the writings or words are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue. Thus, if the question be whether a party has acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original and material evidence. Illustrations of this⁶ often occur in actions for malicious prosecu-

¹ 7 A. & E. 325 (Ld. Denman); 4 Bing. N. C. 500 (Coleridge, J.); id. 530 (Alderson, B.); id. 510 (Williams, J.); id. 567 (Tindal, C.J.).

² "The Supr. Ct. of Jud. Act, 1873" (36 & 37 V. c. 66), § 16; "The Supr. Ct. of Jud. Act, 1875" (38 & 39 V. c. 77), § 18.

³ When the ecclesiastical tribunals were courts of probate, they adopted a different rule from that established by the case of *Doe d. Tatham v. Wright*; and in questions respecting the mental capacity of a testator, they

admitted, as evidence of *treatment*, letters written to him by his friends, without proof of any recognition on his part (*Morgan v. Boys*, 1836 (Sir H. Jenner); *Handley v. Jones*, 1836; *Waters v. Howlett*, 1831 (Sir J. Nicholl))—and, as evidence of *opinion*, letters written by his relatives even to other parties: *Wheeler v. Alderson*, 1831 (Sir J. Nicholl).

⁴ Gr. Ev. § 100, in great part.

⁵ *Bartlett v. Delprat*, 1808 (Am.); *Du Bost v. Beresford*, 1810.

⁶ Gr. Ev. § 101, in part.

tion,¹ or libel ;² and in cases of agency, and of trusts. Thus, in an action for malicious prosecution, a plaintiff—to show that the magistrate's leniency in admitting him to bail was occasioned, not by the intercession of the defendant, but by a letter said to have come from a great personage—may give such letter in evidence, without proof that it was written by that personage's authority.³ A defendant in such a case may state that he acted on the advice of a magistrate in what he did.⁴ An affidavit by a clerk of prosecutor's solicitor, used on an application for bail stating that means had been taken on the part of the prosecutor to prevent a person from becoming bail for the plaintiff, is likewise admissible in such an action as original evidence, without the clerk's being called to prove by whose instructions he had made it.⁵ And the *replies* given to inquiries made at the residence, either of an absent witness, or of a bankrupt, denying that he was at home, are original evidence, without examining the persons to whom they were addressed, inasmuch as to establish the denial (which is the only material fact) the testimony of the parties inquiring is sufficient.⁶

§ 577.⁷ This doctrine not only applies whenever the fact that a certain communication was made, and not its truth or falsehood, is the point in controversy ;⁸ but it also extends to those cases, where the *truth* of the fact in dispute will be inferred from the *existence* of another fact which is under investigation. Thus the *existence* of *general reputation, reputed ownership, public rumour, general character, general notoriety*, and the like, is *prima facie* evidence of its *truth*. In other words, the fact that the rumour which is in fact composed of the speech of third persons not under oath exists, is original evidence and not hearsay; rumour showing the concurrence of many voices as to the immediate subject of inquiry

¹ Ravenga v. Mackintosh, 1824.

² Coleman v. Southwick, 1812 (Am.).

³ Taylor v. Williams, 1837.

⁴ Monaghan v. Cox, 1892 (Am.).

⁵ Taylor v. Williams, 1837.

⁶ Crosby v. Percy, 1808 ; Key v. Shaw, 1832 ; Morgan v. Morgan, 1832 ; Sumner v. Williams, 1809 (Am.) ; Pelletreau v. Jackson, 1833

(Am.) ; Phelps v. Foot, 1815 (Am.).

Where it is necessary to show, not only that diligent search has been made for a witness, but that he is actually absent, such evidence is not admissible. See ante, §§ 475, 517.

⁷ Gr. Ev. § 101, in part.

⁸ Whitehead v. Scott, 1830 ; Shott v. Strealfeld, 1830.

raises a presumption that the fact in which they concur is true.¹

§ 578. For example, *general reputation* is usually admissible to establish the fact of parties being married.² In many of the reported cases on this subject the marriage has been proved by evidence of certain specific facts, such as the parties being received into society as man and wife, being visited by respectable families in the neighbourhood, attending church and public places together, and otherwise demeaning themselves in public, and addressing each other, as persons actually married.³ But mere general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute,⁴ will be receivable in proof of marriage. Indeed, the uncorroborated statement of a single witness, who did not appear to be related to the parties, or to live near them, or to know them intimately, but who asserted that he had *heard* they were married, has been after verdict held sufficient *primâ facie* to warrant the jury in finding marriage, the adverse party not having cross-examined the witness, nor controverted the fact by proof.⁵ And a fact, as, *e. g.*, a marriage, may be even established by reputation, though one of the parties to it denies it.⁶

§ 579. Upon somewhat similar grounds, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness may be called to prove that several persons not examined at the trial had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance;⁷ and on a question whether a libellous painting represents a certain individual, the

¹ *Foulkes v. Sellway*, 1800; *Jones v. Perry*, 1796; *Oliver v. Bartlett*, 1819; *Gurr v. Rutton*, 1816.

² Except in petitions for damages for adultery and prosecutions for bigamy, where, as we have seen (*ante*, § 172), strict proof is required.

³ *Kay v. Duchesse de Vienne*, 1811; *Hervey v. Hervey*, 1773; *Birt v. Barlow*, 1779; *Read v. Passer*, 1794; *Leader v. Barry*, 1795; *Doe v. Fleming*, 1827; *Goodman v. Goodman*, 1858; *Smith v. Smith*, 1811; *Ham-*

mick v. Bronson, 1812; *In re Taylor*, 1842. These might possibly be put upon the ground that they amount to *admissions* by the parties themselves.

⁴ *Lyle v. Ellwood*, 1874 (Hall, V.-C.); *Collins v. Bishop*, 1878 (Malins, V.-C.).

⁵ *Evans v. Morgan*, 1832.

⁶ *Elliott v. Totnes Union*, 1893.

⁷ *R. v. Vincent*, 1840; *Redford v. Birley*, 1822.

declarations of spectators while looking at the picture in the exhibition are admissible.¹

§ 580.² Whenever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And the question whether they were real, or feigned, is for the jury to determine. Thus, the representations by a *sick person* of the nature and effects of the *malady* under which he is labouring are receivable as original evidence, whether they be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statements.³

§ 581. Accordingly, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before he took the poison, have been received in evidence for the purpose of proving the state of his health at that time.⁴ In actions or indictments for assault, what a man has said about himself to his surgeon is evidence to show what he suffered by reason of the assault;⁵ on an indictment for highway robbery, the fact that the

¹ Du Bost v. Beresford, 1810 (Ld. Ellenborough).

² Gr. Ev. § 102, in part.

³ Aveson v. Ld. Kinnaird, 1805; R. v. Blandy, 1752; Grey v. Young, 1823 (Am.); Gilchrist v. Bale, 1839 (Am.). To such an extent has this doctrine been carried that where, in an action by a husband upon a policy of insurance on the life of his wife, the question was as to the state of the wife's health at the time when the policy was effected, a witness for the defendants was allowed to state the result of a conversation with the deceased, which took place shortly after the surgeon who was consulted in effecting the insurance had given a certificate of her health, in the course of which the deceased had expressed an apprehension that she should only live a few days, and

had added that she had not been well from a time preceding her being examined by the surgeon. The conversation being held admissible, although at that time it was a general rule that the declaration of a wife against her husband must be excluded (see, now, 16 & 17 V. c. 83), as the surgeon had been first called by the plaintiff, and had admitted that he had formed his opinion respecting her health, principally from the satisfactory answers which she then gave to his inquiries: Aveson v. Ld. Kinnaird, 1805. In Witt v. Witt and Klindworth, 1862, Sir C. Cresswell rejected *letters* written by a patient to a medical man describing his symptoms. Sed qu.

⁴ R. v. Johnson, 1847 (Alderson, B.); R. v. Blandy, 1752.

⁵ Aveson v. Ld. Kinnaird, 1805

prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed, will perhaps be admissible.¹ In prosecutions for rape, proof that the woman shortly after the injury complained that a dreadful outrage had been perpetrated upon her, would seem to be receivable as independent evidence;² and if the prosecutrix were called as a witness, such complaints would *à fortiori* be admissible as tending to confirm her credit.³ In no case, however, can the *particulars* of the complaint be disclosed by witnesses for the Crown, either as original, or as confirmatory evidence, but the details of the statement can only be elicited by the prisoner's counsel on cross-examination.⁴

§ 582. In consequence, too, of the general rule⁵ that the *mental feelings* of individuals may be shown by proof of what they naturally expressed at the time, in petitions for damages on the ground of adultery,⁶ if it be material, with the view to damages, to ascertain upon what terms the husband and wife lived together before the seduction, their language and deportment towards each other, their correspondence together, and their conversations and correspondence with third persons, are original evidence.⁷ But here, to guard against abuse, it is required to be proved by some evidence, independent of the date appearing on the face of the letters,⁸ that they were written by the wife to the husband prior to

(Lawrence, J.); *R. v. Guttridge*, 1840 (Parke, B.).

¹ *R. v. Wink*, 1834; commented upon (Cresswell, J.) in *R. v. Osborne*, 1842. The witness, however, cannot be further asked whether on making the complaint, prosecutor mentioned anyone's name: *Id.*

² *R. v. Megson*, 1840 (Rolfe, B.); *R. v. Osborne*, 1842 (Cresswell, J.); *R. v. Lunny*, 1854 (Monahan, C.J.). In *R. v. Guttridge*, 1840, where a prosecutrix for a rape was absent from the trial, Parke, B., rejected proof of her complaint, apparently on the ground that it was only confirmatory evidence.

³ *R. v. Megson*, 1840; *R. v. Clarke*, 1817; *R. v. Wood*, 1877 (Bramwell, L. J.).

⁴ *R. v. Walker*, 1839 (Parke, B.); *R. v. Osborne*, 1842; *R. v. Quigley*, 1842 (Torrens, J.), *Ir.* But see *R.*

v. Wood, 1877 (Bramwell, L. J.). It is difficult to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because, if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial: see *R. v. Walker*, 1839.

⁵ *Supra*, § 580.

⁶ See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

⁷ *Trelawney v. Coleman*, 1817; *Willis v. Bernard*, 1832; *Winter v. Wroot*, 1834 (Ld. Lyndhurst); *Gilchrist v. Bale*, 1839 (Am.).

⁸ *Trelawney v. Coleman*, 1817 (Holroyd, J.); *Houlston v. Smyth*, 1825 (Best, C. J.).

any suspicion of misconduct on her part, and, consequently, at a time when it cannot be supposed that there was any reason for collusion.¹ It is not, however, necessary, in the absence of other suspicious circumstances, to explain why the husband and wife were living apart at the time when the letters were written,² though of course it is expedient that such explanation should, if possible, be given.

§ 583.³ Another rule is that *declarations and acts* which form what is called part of the *res gestæ* are not regarded as hearsay, but admitted as original evidence. It is not easy to explain of what the *res gestæ* consists. The best explanation of the principle which admits evidence of *res gestæ* is this. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and each in turn becomes the prolific parent of others: each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. Consequently, these surrounding circumstances may always be shown to the jury along with the principal fact, as it constitutes part of the *res gestæ*, in other words of the transaction if looked at in its entirety and as a whole. It is impossible to say in each case how the individual judge will exercise his discretion. For there are no fixed principles for dealing with this question;⁴ the application of the doctrine of *res gestæ* is consequently hard to understand. Lord Blackburne once sarcastically remarked to another counsel in the editor's hearing, that if one tenders inadmissible evidence, he should, if it is in chief, say that "it is part of the *res gestæ*," and, if it is in re-examination, that "it arises out of the cross-examination." Perhaps the best general idea of what is meant by *res gestæ*, is that this expression includes everything that may be fairly considered "an incident of the event under consideration." The following examples may serve as illustrations of

¹ *Edwards v. Crock*, 1801 (Ld. Kenyon); *Trelawney v. Coleman*, 1817; *Wilton v. Webster*, 1835 (Coleridge, J.). See Wyndham's Divorce Bill, 1855, H. L.

² *Trelawney v. Coleman*, 1817.

³ Gr. Ev. § 108, in great part.

⁴ Per Parke, J., in *Rawson v. Haigh*, 1824; *Ridley v. Gyde*, 1832; *Pool v. Bridges*, 1826 (Am.); *Allen v. Duncan*, 1831 (Am.).

rulings upon the point, and would doubtless be followed if ever a similar, or nearly similar, state of matters arose. Thus, on the trial of Lord George Gordon for treason, the cry of the mob, who accompanied the prisoner, was received in evidence, as forming part of the *res gestæ*, and showing the character of the principal fact.¹ What the driver of a train said directly after a child has been knocked down by his train is also evidence.² On an indictment for manslaughter, a statement as to how the accident happened, made by the deceased immediately after he was knocked down, has been held admissible.³ Even evidence as to what the wife said immediately after the occurrence, was received in an action by husband and wife for wounding the wife.⁴ Directions given by an alleged owner of goods to a person to whom he has given actual possession of such goods, to the effect that the goods are to be treated as a certain person, who has since become bankrupt, should direct on calling, are evidence on a question of title arising between the alleged owner of such goods and the bankrupt's assignees.⁵

§ 584. Generally where a person enters upon land to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin,⁶ or the like; or changes his actual residence, or domicile,⁷ or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself; or, in fine, does, or suffers, any other act material to be understood;⁸ his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts.⁹ Thus, in a suit for enticing away a servant, his

¹ *R. v. Ld. George Gordon*, 1781.

² *Hermes v. Chicago Ry. Co.*, 1891 (Am.); *International Ry. Co. v. Anderson*, 1891 (Am.). Compare, post, note¹ to § 584.

³ *R. v. Foster*, 1834 (Parke and Patteson, JJ., and Gurney, B.), questioned by Cockburn, C.J., in *R. v. Bedingfield*, 1879, and in a subsequent pamphlet, but supported by the author in a letter to the Chief Justice in reply, published by Messrs. Maxwell in 1880.

⁴ *Thompson v. Trevanion*, 1694 (Ld. Holt).

⁵ *Sharp v. Newsholme*, 1839.

⁶ *Co. Lit.* 49 b, 245 b; *Robison v.*

Swett, 1825 (Am.).

⁷ *Brodie v. Brodie*, 1861.

⁸ *Parrott v. Watts*, 1877; *Mutual Life, &c. v. Hillman*, 1892 (Am.).

⁹ *Bateman v. Bailey*, 1794, and the observations of Mr. Evans upon it, in 2 Poth. Obl. App. No. xvi. § 11; *Rawson v. Haigh*, 1824; *Vacher v. Cocks*, 1829 (Ld. Tenterden); *Smith v. Cramer*, 1835; *Doe v. Arkwright*, 1833 (Parke, B.); *Lord v. Colvin*, 1857; *Gorham v. Canton*, 1828 (Am.); *Thorndike v. City of Boston*, 1840 (Am.); *Lund v. Tyngsborough*, 1851 (Am.). In *R. v. Edwards*, 1872, Quain, J., on a trial of wife murder, allowed a witness to

statement at the time of leaving his master will be received, as tending to show the *motive* of his departure.¹ Similarly, upon an inquiry as to the state of mind, sentiments, intentions, or opinions² of a person at any particular period, his contemporaneous declarations are admissible as parts of the *res gestæ*, though evidence of this nature is seldom entitled to much weight.³

§ 585. The operation of the doctrine that statements may be admissible in some cases as part of the *res gestæ* is so extensive that it may sometimes even override the general provision of law, which precludes a party's declarations from being evidence for himself. For example, in an action for falsely representing the solvency of a stranger, whereby the plaintiffs were induced to trust him with goods, statements by them at the time when the goods were supplied, that they trusted him in consequence of the representation, were received as evidence on their behalf;⁴ and in an action against a bailee for loss by negligence, his declarations, contemporaneous with the loss, are, in America, admissible in his favour, as tending to show the nature of the loss.⁵ But witnesses called to speak to what defendant said at a meeting held on a certain date, though they may be cross-examined as to the whole conversation at that meeting, cannot be asked (with a view to explaining his intentions or conduct) what defendant said on other occasions.⁶

§ 586. In the practical application of the doctrine as to the admission of evidence as part of the *res gestæ*, two points deserve especial attention. The first is, that declarations,—though admissible as evidence of the declarant's *knowledge or belief* of the facts to which they relate, and of his *intentions* respecting them,—are no

state what the wife had said about her husband a week before her death, on bringing to the cottage of the witness an axe and carving knife to be taken care of. Sed qu. as to this case.

¹ Hadley v. Carter, 1835. See, however, R. v. Wainwright, 1876 (Cockburn, C.J.), and R. v. Pook, 1871 (Bovill, C.J.), et qu. In Roscoe's Nisi Prius (16th edit. Vol. I. p. 619), it is stated that the declarations of a coachdriver as to the loss of a parcel sent by coach are evidence against his master, and Mayhew v. Nelson, 1833, is cited for this. But the proposition is too broadly stated; declarations by a servant are only evidence

if made at the time. See ante, § 583.

² Barthelemy v. The People, &c., 1842 (Am.).

³ Hodgson v. De Beauchesne, 1858 (Dr. Lushington), cited with approbation (Jessel, M.R.) in Doucet v. Geoghegan, 1878; Haldane v. Eckford, 1869 (James, L.J.); and Doucet v. Geoghegan, 1878 (id.).

⁴ Fellowes v. Williamson, 1829 (Ld. Tenterden). See, also, Milne v. Leisler, 1862.

⁵ Story, Bail. § 339; citing Tomkins v. Saltmarsh, 1826. See, also, Beardslee v. Richardson, 1833 (Am.).

⁶ See 21 How. St. Tr. 542, 543 (1781).

proof whatever of the facts themselves. If it be necessary to show the existence of such facts, proof aliundè must be laid before the jury. Indeed, it seems that, in strict practice, this proof should be given in the first instance, before the court be called upon to receive evidence of the declarations. For instance, the fact of insolvency must be established before statements of the insolvent to show that he was aware of his embarrassed circumstances will be admitted.¹

§ 587. The second point to be observed with regard to the admission of hearsay evidence is, that, although acts, by whomsoever done, are *res gestæ* when they are relevant to the matter in issue,² yet if they be *irrelevant*, both the acts themselves and the declarations qualifying or explaining them will be rejected. For instance, in an action against a town for injuries sustained through a defect in a highway, the declarations of a surgeon, since deceased, made at the time of his examining the plaintiff's wounds, have been rejected as evidence of the nature and extent of the injuries, since the fact of the surgical examination would itself have been immaterial, and the declarations were no more than the mere hearsay expression of a professional opinion.³ To non-attention to this principle was due one of the main fallacies in support of the contention that letters written to a person are evidence (which we have seen that they are not)⁴ in support of his sanity. For such a letter, if admissible at all, must be so, either because the act done in writing and sending it is evidence in itself, or because the opinion which is inferentially expressed by it being done is evidence. But the act done (that of writing and sending the letter) is

¹ *Thomas v. Connell*, 1838; *Craven v. Halliley* (no date), (Parke, B.); *Vacher v. Cocks*, 1829. Sometimes, indeed, under the law relating to bankrupts, the truth of the facts need not be proved. Again, if an act relied on as an act of bankruptcy be an absconding with intent to delay creditors, a declaration by the bankrupt that he left home to avoid a writ will be admissible, though no evidence be given that any writ was actually out against him, because, in order to constitute this act of bankruptcy, neither writ nor pressure is in fact necessary (*Rouch v. Gt. West.*

Ry. Co., 1841; *Newman v. Stretch*, 1829 (Parke, J.); *Ex parte Bamford*, 1809; *Robson v. Rolls*, 1833; but the departure from home, which is the substantive act, must be proved by evidence independent of the declaration; and being an act in itself equivocal, the statement of the bankrupt, made during its continuance, is admissible to show the intention with which it was done.

² *Wright v. Doe d. Tatham*, 1837 (Parke, B.).

³ *Lund v. Tyngsborough*, 1815 (Am.).

⁴ *Supra*, § 572.

(like the medical examination in the case just cited) obviously immaterial to the strict issue (that of sanity or insanity); and¹ where the declaration per se cannot be received, no case has yet established that the union of the two things (the irrelevant act and the accompanying declaration) will render them admissible.²

§ 588. In all these cases the principal points for consideration are, whether the *circumstances and declarations* offered in proof were so connected with the *main fact* under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was at one time thought necessary that they should be *contemporaneous* with it;³ but it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential.⁴ For example, what a bankrupt said immediately on his return home, as to the place where he had been, and his motive in going, is admissible;⁵ where a disputed act of bankruptcy is whether a transfer was fraudulent or not, a declaration by the bankrupt, in which he gave a false account of the matter, made nearly a month after it had taken place, to a creditor, who had pressed for payment of his debt immediately before the transfer, and had been promised security for the following day; when, instead of keeping his word, the bankrupt had transferred his property to a relative, and had absconded, was held to be receivable in evidence.⁶ And where a trader had absented himself from home during the latter half of February and the commencement of March, two letters written by him on the 16th of January, in which he had asked for time on some bills of exchange payable in February, were admitted in evidence, as tending to throw light

¹ As before observed, § 572.

² See per Coltman, J., in *Wright v. Doe d. Tatham*, 1837, ante, § 52.

³ This seems still to be the law in America. In *Enos v. Tuttle*, 1820 (Am.), Hosmer, C.J., observed, that declarations, to become part of the *res gestæ*, "must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they

were intended to explain, and so to harmonize with them, as obviously to constitute one transaction."

⁴ *Rouch v. Gt. West. Ry. Co.*, 1841.

⁵ *Bateman v. Bailey*, 1794; recognized by the court in *Rouch v. Gt. West. Ry. Co.*, 1841.

⁶ *Ridley v. Gyde*, 1832; dissentiente Gaselee, J., but recognized and confirmed in *Rouch v. Gt. West. Ry. Co.*, 1841.

on the cause of his absence.¹ Indeed, these cases exemplify the remarks of Mr. Justice Park,² namely, "that it is impossible to tie down to time the rule as to the declarations," and that, if connecting circumstances exist, a declaration may, even at a month's interval, form part of the whole *res gestæ*.

§ 589.³ Still, an act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere *narrative of a past occurrence*, or by an *isolated* conversation held, or an isolated act done, at a later period.⁴ Accordingly, the schedule of an insolvent, delivered four months after his execution of a deed of assignment, has been rejected, when tendered by the assignees as evidence that the indenture was executed with intent to petition ;⁵ and where a creditor called upon a bankrupt in the morning, and being told that he was out, paid a second visit in the evening of the same day, when the bankrupt made a statement respecting his absence in the morning, this statement was held inadmissible for the purpose of showing that the bankrupt had intentionally denied himself to his creditors, it being, he considered, too remote in point of time from the absence which it purposed to explain.⁶ But declarations made, or letters written, during absence from home, explanatory of the motive of departure, are nevertheless admissible as original evidence, the departure and absence being regarded as one continuing act.⁷

§ 590.⁸ Similar principles to those just mentioned, namely, that the *acts* and the *declarations* must be connected together as regards time and otherwise, apply to the reception of evidence of the *acts* and *declarations* of one of several individuals in a company of *conspirators* as evidence against his fellows. Here, a foundation should first be laid by proof, sufficient, in the opinion of the judge, to establish *primâ facie* the fact of conspiracy between the parties, or, at least, proper to be laid before the jury, as tending to establish such fact. The connexion of the individuals in the unlawful enterprise being

¹ *Smith v. Cramer*, 1835.

² In *Rawson v. Haigh*, 1824.

³ Gr. Ev. § 110, slightly.

⁴ *Hyde v. Palmer*, 1862.

⁵ *Peacock v. Harris*, 1836.

⁶ *Lees v. Marton*, 1832 (Parke, B.).

It is, however, hardly possible to reconcile this case with *Bateman v.*

Bailey, 1794, cited ante, § 588, n. ⁵, and it possibly would now be considered as applying the principle stated in the text too strictly.

⁷ *Rouch v. Gt. West. Ry. Co.*, 1841; *Rawson v. Haigh*, 1824.

⁸ Gr. Ev. § 111, in great part.

thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them.¹

§ 591. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before proof of the conspiracy has been given; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this mode of proceeding rests in the discretion of the judge, and in seditious or other general conspiracies is seldom permitted, except under particular and urgent circumstances. If it were, the jury might be misled to infer the fact of the conspiracy itself from the declarations of strangers. Still, as a conspiracy need not be established by proof which actually brings the parties together, but may be shown, like any other fact, by circumstantial evidence, the detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession relative to the main design, will sometimes from necessity be admitted, as steps to establish the conspiracy itself. On this subject it is difficult to establish a general inflexible rule, and each case must, in some measure, be governed by its own peculiar circumstances.²

§ 592.³ It makes no difference at what *time* the party accused is proved to have entered into the conspiracy or combination; because every one, who agrees with others to effect a common illegal purpose, is generally considered in law as a party to every act, which either had before been done, or may afterwards be done, by the confederates, in furtherance of the common design.⁴ One or two

¹ *R. v. Stone*, 1796; *American Fur Co. v. U. S.*, 1829 (Am.); *Crowninshield's case*, 1830 (Am.); *U. S. v. Gooding*, 1827 (Am.); *Com. v. Eberle*, 1817 (Am.). In *R. v. McKenna*, 1842 (Ir.), Pennefather, C.J., said:—"It is necessary to prove the existence of a conspiracy, and to connect the prisoner with it in the first instance, where you seek to give in evidence against him the declaration of a co-conspirator; and having done so, you are then at liberty to give in

evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admissions."

² See *R. v. Blake*, 1844; *Ford v. Elliot*, 1849.

³ *Gr. Ev.* § 111, in part.

⁴ *R. v. Watson*, 1817 (Bayley, J.).

individuals may have concocted the scheme, but all who afterwards join in carrying it out are equally guilty with the originators; ¹ at least, if any evidence be forthcoming from which their adoption of the previous acts of the association can reasonably be inferred.² Neither does it matter whether the acts were done, or the declaration made, in the *presence* or in the *absence* of the accused, but everything said or done by any one of the conspirators or accomplices in furtherance of the common object is evidence against each and all of the parties concerned, whether they were present or absent, and whether or not they were individually aware of what was taking place.³ For example, it is on this principle that (as we have seen ⁴) the cries of a mob, with whose proceedings the prisoner is connected, though made in his absence, are admissible against him, as explanatory of the objects which he, in common with the multitude, had in view;⁴ proof of expressions used by persons going to a meeting convened by the defendant is admissible,⁵ and papers supporting a defendant's views, publicly sold at meetings convened by him, may be received in evidence, though no proof be given connecting the defendants with the persons selling the papers.⁶

§ 593. Care, however, must be taken to distinguish between declarations, which are either acts in themselves purporting to advance the objects of the criminal enterprise, or which accompany and explain such acts, and those statements (not amounting, of course, to admissions by the accused himself), whether written or oral, which, although made during the continuance of the plot, are in fact a *mere narrative* of the measures that have already been taken. These last statements are, as before explained,⁷ inadmissible. For example, a letter, written by a co-conspirator to a private friend, who was unconnected with the plot, giving an account of the proceedings of a society to which the writer and the defendant were proved to have belonged, and enclosing several seditious songs stated to have been composed by the writer, and sung by him at a meeting of the society, has been rejected, on the ground that such

¹ *R. v. Murphy*, 1837 (Coleridge, J.).

² *R. v. O'Connell*, 1843-4 (Ir.) (Pennefather, C.J.).

³ *R. v. Brandreth*, 1817.

⁴ *R. v. Ld. Geo. Gordon*, 1781, *supra*, § 583; cited by Buller, J., in

R. v. Hardy, 1794. See *R. v. Petcherini*, 1856.

⁵ *R. v. Hunt*, 1820; *Redford v. Birley*, 1822.

⁶ *R. v. O'Connell*, 1843-4 (Ir.).

⁷ *Ante*, § 589.

letter was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot, and, as such, only admissible against himself.¹ On the other hand, a letter written by a co-conspirator to a delegate in the country, describing the events that had occurred in London, *and encouraging him thereby to proceed in the criminal business in which he was engaged*, being considered by the court as an act done in furtherance of the plot, has been received against the defendant, though no evidence was given to show that it had ever reached the person for whose perusal it was intended.²

§ 594. In a similar way entries in books made in furtherance of a conspiracy are admissible,³ but memoranda of payments made *after* the fraud by one conspirator to another are not.⁴ Neither is evidence of a conversation overheard between men apparently *returning* from a meeting, held within an hour before, about half a mile off, though it be offered as evidence, not only of the general nature of the meeting, but of the effect that was likely to be produced by the language there employed.⁵ In a word, the declarations of a conspirator or accomplice are receivable against his fellows only when they are in themselves acts, or when they accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.

§ 595. On a somewhat similar principle, if, after his apprehension, papers be found on the person or at the lodgings of a co-conspirator, they will be admissible or not against either an alleged conspirator according as there is or is not evidence that they existed previously to the arrest of the prisoner who is on his trial. If there be no such evidence, they will be rejected, as a prisoner cannot be responsible for acts or writings, which possibly may not have existed until after the

¹ *R. v. Hardy*, 1794 (Eyre, C.J., Macdonald, C.B., and Hotham, B.; Buller and Grose, JJ., diss.). In *R. v. Watson*, 1817, Ld. Ellenborough observed that there was a great weight in the arguments of Buller and Grose, JJ.

² *R. v. Hardy*, *supra* (Macdonald, C.B., Hotham, B., Buller and Grose, JJ.; Eyre, C.J., dubit.).

³ *R. v. Blake*, 1844.

⁴ *Id.*

⁵ *R. v. O'Connell*, 1843-4 (Ir.). See, also, *R. v. Murphy*, 1837; *R. v. Watson*, 1817.

common enterprise was, so far as he was concerned, at an end;¹ but if their previous existence be established, either by direct proof, or by strong presumptive evidence, no objection to their admissibility can prevail.²

§ 596. On an indictment for conspiracy, unpublished *writings* upon *abstract subjects* are certainly admissible in evidence if it be proved that they were intended to be used in furtherance of the common design.³ Possibly, too, such writings, although no proof that they were connected with the common design was given, would be in strictness admissible if they appeared to be *closely connected* with the nature and object of the alleged crime; but unpublished writings upon abstract subjects of a kindred nature with the crime charged, but having no direct relation to it, are certainly inadmissible.⁴ Where *conversations* of co-conspirators or accomplices are proved, the effect of the evidence will of course depend upon the surrounding circumstances, such as the fact and degree of the prisoner's attention to what was said, and his approval or disapproval thereof.⁵

§ 597. The *declarations* of *co-trespassers* in civil actions are governed by rules similar to those in cases of conspiracy which we have just been considering; that is, if several are jointly sued, the declarations of each, which constitute parts of the *res gestæ*, are admissible against all;⁶ while those which amount to mere admissions, or narratives of past events, can only be received against the party making them.⁷ Where no common object or

¹ *R. v. Hardy*, 1794.

² *R. v. Watson*, 1817. See *R. v. McCafferty*, 1866-7 (Ir.). There, acts of insurrection committed after the arrest of the prisoner, but in consequence of instructions given by him before he was apprehended, were held to be admissible in evidence on a charge of conspiracy to raise rebellion.

³ *R. v. Watson*, 1817.

⁴ In *Algernon Sidney's case*, 1683, observed upon (Abbott, J.) in *R. v. Watson*, 1817, a treatise containing speculative republican doctrines, which not only was unpublished and apparently unconnected with the treasonable practices of which he

was accused, but had been composed several years before the trial, was, indeed, admitted in evidence (Jefferies, J.). But subsequent times have regarded this trial as a judicial murder.

⁵ *R. v. Hardy*, 1794 (Eyre, C.J.).

⁶ See *R. v. Hardwick*, 1809 (Ld. Ellenborough); *Powell v. Hodgetts*, 1826 (Garrow, B.); *North v. Miles*, 1808 (Ld. Ellenborough); *Bowsher v. Calley*, 1808 (id.).

⁷ *Daniels v. Potter*, 1830 (Tindal, C.J.). The case of *Wright v. Court*, 1825—where in an action for false imprisonment, Garrow, B., admitted the declarations of a co-defendant, showing personal malice, as evidence against the other defendants, though

motive is imputed, as in actions for negligence, the declaration of each defendant is admissible against himself alone.¹

§ 598.² The principles just discussed also apply to cases of *partnership*. Whenever any number of persons are associated together in the joint prosecution of a common enterprise or design (as in commercial partnerships, and similar cases), the act or declaration of each member, in furtherance of the common object of the association, is the act or declaration of all. By the very act of association each partner is constituted the agent of the others, for all purposes within the scope of the partnership concern;³ unless, under the special circumstances of the case, an intention can be inferred by the jury, that a particular act should not be binding without the direct concurrence of each individual partner.⁴ While the firm thus created exists, it speaks and acts only by the several members; but when that existence ceases by dissolution, the subsequent acts of the individual members are binding on themselves alone,⁵ except so far as otherwise agreed upon by the articles of association or dissolution,⁶ or as the acts relate to the previous business of the firm.⁷ An instance of this last exception arises where one partner in a firm which has been dissolved has admitted, subsequently to the dissolution, the payment of a debt due to the firm.⁸

§ 599. In cases such as that just instanced, the party making the admission must, however, be, at the time, jointly interested with the parties against whom his statement was tendered in evidence.⁹ Where, therefore, a bill was filed to set aside a bond given to a

made in their absence, and several weeks after the act complained of—probably would not now be regarded as a safe precedent.

¹ *Daniels v. Potter*, 1830 (Tindal, C.J.).

² Gr. Ev. § 112, in part.

³ *Sandilands v. Marsh*, 1819; *R. v. Hardwick*, 1809; *Fox v. Clifton*, 1830; *Nicholls v. Dowding*, 1815; *Hodenspyl v. Vingerhoed*, 1818; *Van Reimsdyk v. Kane*, 1813 (Am.); *Coit v. Tracy*, 1830 (Am.). Ante, § 185.

⁴ *Latch v. Wedlake*, 1840.

⁵ *Wood v. Braddick*, 1808 (Sir J. Mansfield); *Petherick v. Turner*,

1802; *Kilgour v. Finlyson*, 1789.

⁶ *Burton v. Issitt*, 1821; *Bell v. Morrison*, 1828 (Am.).

⁷ *Wood v. Braddick*, 1808. See *Parker v. Morrell*, 1848.

⁸ *Pritchard v. Draper*, 1830—31 (Ld. Brougham). *Loomis and Jackson v. Loomis*, 1854 (Am.), expressly supports the general proposition in the text.

⁹ See, and compare, the observations of Ld. Cottenham in *Parker v. Morrell*, 1848; of the Reporter in S. C. 464, n. b.; and of Cresswell, J., in S. C. on issue tried at Nisi Prius.

banking firm on the ground of fraud, and before the commencement of the suit, the partner, who originally managed the transaction, had retired from the firm, and ceased to have any longer an interest in the bond, this man's answer was held not to be receivable in evidence against the continuing partners.¹

§ 600. Moreover, as against other members of a firm, neither a partner's written acknowledgment of a partnership debt, nor written promise to pay it, nor even actual payment by him of the interest, or part payment of the principal due, whether made during the partnership, or after the dissolution,² will take a case out of the Statute of Limitations.³

§ 601. It has, indeed, been contended⁴ that a signature by one of several partners, *using the name of the firm*, will take the case out of the statute as to all the partners, in a transaction in which all are interested, because a partnership name is the name of each and every member of the firm, and the enactment just referred to speaks merely of *joint contractors*, and does not in terms mention *partners*, but the contention does not appear to be tenable.⁵

§ 602.⁶ The *declarations of agents* are admissible against their principals on grounds very similar to those which govern the declarations of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does *in the lawful prosecution* of that business, is the act of the principal. As Mr. Justice Story observes, "where the acts of the agent will bind the principal, there his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*."⁷ They are original evidence and not hearsay; and, being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them.⁸ Still, the admission or declaration of an agent binds his principal only when made during the continuance of the agency,

¹ Parker v. Morrell, 1848.

² Bristow v. Miller, 1848 (Ir.); Watson v. Woodman, 1875.

³ Tenterden's Act of 9 G. 4, c. 14, § 1, amended by 19 & 20 V. c. 97, s. 14 ("Mercantile Law Amendment Act, 1856"); Jones v. Ryder, 1838; Hop-

kins v. Logan, 1839 (Parke, B.). See, also, post, §§ 744, 745.

⁴ Clark v. Alexander, 1844.

⁵ See Bristow v. Miller, 1848 (Ir.).

⁶ Gr. Ev. § 113, in part.

⁷ Story, Agen. § 134.

⁸ Doe v. Hawkins, 1841.

in regard to a transaction then depending, *et dum fervet opus*.¹ When the agent's right to interfere in the particular matter has ceased, the principal is no longer affected by his declarations, any more than by his acts, but they will be rejected in such case as mere hearsay.²

§ 603. Accordingly, when a horse-dealer, or livery-stable keeper, employs a servant to sell a horse, any statement made by him respecting the horse *at the time of sale*, even though it amount to a warranty of soundness,³ which the servant has been really ordered not to give, will bind the master.⁴ But the servant's declarations or acknowledgments *at any other time*, whether made to the purchaser or to a stranger, will not be received.⁵ Again, if a letter written by an agent form the whole or part of an agreement, which by the course of his business he was authorized to make, it will be admissible against the principal, but if it be offered as proof of the contents of a pre-existing contract, or if it contain an account of transactions already performed, it will probably be rejected, though addressed to the principal himself;⁶ unless the principal has replied to it, or has otherwise adopted or acted upon it, in which case the agent's letter will be received as explanatory of the principal's conduct.⁷ On the same principle a letter, written during the voyage, by the master of a ship to the owners, while admissible against the latter as to the *facts* it states, is not so as evidence of the master's opinion.⁸ The rules are the same as to an engineer's log-book kept during the voyage.⁹

¹ See *Kirkstall Brewery Co. v. Furness Ry. Co.*, 1874; *Re Devala Prov. Gold Min. Co.*, 1883.

² *Fairlie v. Hastings*, 1804 (Sir W. Grant); *Garth v. Howard*, 1832; *Langhorn v. Allnutt*, 1812 (Gibbs, J.); *Betham v. Benson*, 1818 (Dallas, C.J.); *Mortimer v. M'Callan*, 1840; *R. v. Hall*, 1838 (Littledale, J.); *The Mechanics' Bk. of Alexandria v. Bk. of Columbia*, 1820 (Am.); *Hannay v. Stewart*, 1837 (Am.); *Stockton v. Demuth*, 1838 (Am.); *Stewartson v. Watts*, 1839 (Am.); *Baring v. Clark*, 1837 (Am.); *Bk. of Monroe v. Field*, 1842 (Am.); *Story*, Agen. §§ 134, 137.

³ *Brady v. Tod*, 1861 (Erle, C.J.). But the servant of a private owner,

intrusted to sell a horse, not at a fair or public mart, but on some one particular occasion, has no implied authority to bind his master by a warranty: *Id.* 223. See *Miller v. Lawton*, 1864.

⁴ *Howard v. Sheward*, 1866.

⁵ *Allen v. Denstone*, 1839 (Erskine, J.); *Helyear v. Hawke*, 1803 (Ld. Ellenborough). See, also, *Peto v. Hagua*, 1804 (Ld. Ellenborough); *Gt. West, Ry. Co. v. Willis*, 1865.

⁶ *Fairlie v. Hastings*, 1804; *Langhorn v. Allnutt*, 1812; *Kahl v. Jansen*, 1812; *Reyner v. Pearson*, 1812.

⁷ *Coates v. Bainbridge*, 1828.

⁸ *The Solway*, 1885.

⁹ *The Earl of Dumfries*, 1885.

§ 604. Sir William Grant has well explained the law upon this subject as follows:¹ “As a general proposition,” said he, “what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But, except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business, in which the person making that assertion was employed as agent. * * * The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say that a man is precluded from questioning or contradicting anything any person has asserted as to him, respecting his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion.”

§ 605. As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, such declarations only bind the principal so far as the agent had legal power to make them.² For example, the declarations and acts of an agent cannot bind an infant, because an infant cannot appoint an agent; so that, if an infant, even by letter of attorney, appoints a person to make

¹ In *Fairlie v. Hastings*, 1804.

² See *Faussett v. Faussett*, 1849; *Hogg v. Garrett*, 1849 (Ir.).

a lease, he will not be bound thereby, neither will his ratification bind him; but such lease, to be good, must be the infant's own personal act.¹ Questions of much nicety often occur, where power to make an admission is sought to be inferred by implication from an authority to do a certain act. Thus, where a wife is authorised, in her husband's absence, to carry on the business of his shop, her admissions, made on application to pay for goods previously delivered at the shop, will be evidence against the husband.² But proof of her acknowledgments of an antecedent contract for the hire of the shop, or of her agreement to make a new contract for the future occupation of it, will be rejected, as it cannot be necessary that the wife should have this extensive power of binding her husband, for the mere purpose of conducting the business of the shop.³ The declarations of a bank manager made behind the bank's counter as to the usual course of business at a bank are evidence against the bankers.⁴ The declarations of a pawnbroker's shopman made behind the shop counter that his master had received goods said to have been deposited with him in the ordinary course of his business, would probably be admissible against the master, because it might well be assumed that the shopman was authorised to answer any inquiries respecting the goods, made by persons interested in them. But if, in the case last suggested, the admission related to a transaction unconnected with the immediate business of the shop,—as, for instance, if it referred to the loan of several hundred pounds on a single pledge at five per cent. interest,—it would not be received.⁵ So again, although the solicitor of a judgment creditor may fairly be assumed to have acted as his client's agent in directing the issue of a *fi. fa.*, because the taking such a step might be essentially necessary for the benefit of the client, yet special instructions to seize particular goods cannot be considered within the scope of any implied authority.⁶

§ 606.⁷ To sum up: there are *three classes of declarations*, which though treated under the head of hearsay, are, in truth, *original*

¹ *Doe v. Roberts*, 1847 (Parke, B.).
See *Hargrave v. Hargrave*, 1850.

² *Clifford v. Burton*, 1823.

³ *Meredith v. Footner*, 1843.

⁴ *Summers v. London Joint Stock Bank*, 1890.

⁵ *Garth v. Howard*, 1832.

⁶ *Smith v. Keal*, 1882, C. A.

⁷ *Gr. Ev.* § 123, in great part.

evidence. The *first* class consists of cases where the fact that the declaration was made, and not its truth or falsity, is the point in question; the *second* includes expressions of bodily or mental feelings, where the existence or nature of such feelings is the subject of inquiry; and the *third* class embraces all other cases, in which the declaration offered in evidence may be regarded as part of the *res gestæ*. These classes are all involved in the principle of the last, and have been separately treated merely for the sake of greater distinctness.

AMERICAN NOTES.

Declarations part of the Res Gestæ. — Among the statements of persons not witnesses to which the rule excluding hearsay does not apply are statements admitted "as part of the res gestæ."

In this phrase both the term "part" and the term "res gestæ" are the subject of conflicting interpretation and no small amount of ambiguity.

Res Gestæ. — It would probably be difficult, if not impossible, to give a wholly satisfactory definition of the phrase *res gestæ*. As is said by the supreme court of Georgia, "The difficulty of formulating a description of the *res gestæ* which will serve for all cases seems insurmountable. To make the attempt is something like trying to execute a portrait which shall enable the possessor to recognize every member of a very numerous family." *Cox v. State*, 64 Ga. 374, 410 (1879). The Latin expression implies the idea of action, of something done; yet, as employed in the law of evidence, facts as well as acts are among the *res gestæ*. Thus, on an indictment for murder, the bullet taken from deceased's body of the same kind as that carried by a pistol habitually carried by the prisoner, and burglar's nippers identified as prisoner's and found near scene of homicide, were held to be admissible "as part of the *res gestæ*." *Williams v. Com.*, 85 Va. 607 (1889). Very possibly, this convenient ambiguity constitutes no small part of the attractiveness of the phrase. The *res gestæ* of any case apparently embraces all such facts as unite to constitute the state of affairs for which legal consequences are claimed. Under such a definition, many facts may be entirely relevant to the issue, and consequently admissible, without assisting to constitute the *res gestæ*. Legal liability in any case is predicated upon the existence of some particular "transaction" or state of affairs. It is this group of facts or events which make up its *res gestæ*. Obviously the degree of remoteness which excludes a relevant fact from being considered part of the *res gestæ* will be largely a matter of judicial discretion, and one in which considerable diversity of opinion may be fairly expected.

Courts have experienced considerable difficulty in fixing the point of time over which the *res gestæ* extends.

Where the question is as to whether the intercourse between a man and woman living together as husband and wife is matrimonial or meretricious, the *res gestæ* covers the entire period of their living together, and includes the declarations as well as the acts of the parties tending to characterize their intercourse. *In re Taylor*, 9 Paige, 611 (1842).

On an indictment for assault with intent to murder, the acts of persons present and apparently co-operating with the prisoner in

his attempt to intercept the prosecutor, on the occasion of the assault, are part of the *res gestæ*. *Ross v. State*, 62 Ala. 224 (1878).

Numerous illustrations of this difficulty will appear in the further consideration of the topic.

DECLARATIONS MAY CONSTITUTE THE RES GESTÆ.—The entire *res gestæ* of a particular case may consist of verbal or written declarations. Where a contract or other obligation is said to result from a conversation between the parties, their statements are proved as the facts which constitute the transaction. With such proof the rule against hearsay has no concern. The verbal facts are proved because from their existence the contract or other obligation arises. *Chick v. Sisson*, 95 Mich. 412 (1893); *State v. Gregory*, 132 Ind. 387 (1892); *Bolds v. Woods*, 9 Ind. App. 657 (1893).

Where a contract is perfected after repeated interviews, all representations made at the previous interviews are included in the *res gestæ*. *Ahern v. Goodspeed*, 72 N. Y. 108 (1878); *Porter v. Waltz*, 60 Mo. 40 (1886). Where there is an agreement to arm and fight, "the *res gestæ* of the transaction comprehend all pertinent acts and declarations of the parties (either or both) which take place in the interval between the agreement to fight and the consummation of the homicide such interval being very brief." *Cox v. State*, 64 Ga. 374, 410 (1879). On the other hand, so long as anything in the usual course of business remains to be done to complete a transaction, — e. g., giving a receipt, — while the parties remain together, whatever is said until the transaction is thus ended assists to constitute the *res gestæ*. *Fifield v. Richardson*, 34 Vt. 410 (1861).

DECLARATIONS FACTS IN THE RES GESTÆ.—Verbal and written declarations may not only constitute the *res gestæ* in a given case, such a declaration may itself be an independent fact in the *res gestæ*.

Where a declaration, oral or in writing, of a person not a witness, is in and of itself part of the *res gestæ*, it is admissible upon ordinary principles. A verbal fact does not differ in its proof from any other fact, equally relevant. Of this nature are declarations showing a particular intention in doing an act. Here the intention is an independent fact legitimately part of the *res gestæ*, and the declaration is admitted because it shows it. Such a declaration may accompany an act, — it most frequently does so; but the declaration is not dependent for its admissibility on being part of the act. As was said by the supreme court of South Carolina, "Where the inquiry is as to a certain transaction not only what was done, but also what was said by those present during the transaction, is admissible for the purpose of explaining its character." *State v. Belcher*, 13 S. C. 459 (1880).

On an indictment for murder, a threat by the defendant to kill shortly before the murder is competent as part of the *res gestæ*,

though no one in particular is named. *State v. King*, 9 Mont. 445 (1890). On the contrary, statements between the parties on the forenoon of the day of an assault are not part of the *res gestæ* of the assault itself. *Rosenbaum v. State*, 33 Ala. 354 (1859). "If an act proved is relevant and material, declarations accompanying the act and strictly explanatory of it are admissible as part of the *res gestæ*. *Tucker v. Peaslee*, 36 N. H. 167 (1858). So where the question was whether A. took part in a mutual affray, the fact that he took part may be shown by his shouting to one about to interfere, to let him alone. The verbal act is itself one of the *res gestæ* facts. *Castner v. Sliker*, 33 N. J. Law, 95 (1868). So, on an indictment for burglary, the fact that a certain person stated in presence of the defendant that she recognized him. "The truth or falsity thereof is not the question, and the testimony is only applicable to *rem ipsam*, as a contemporaneous fact forming part of the *res gestæ*, and as such is admissible, just as any other contemporaneous physical occurrence could be proven." *State v. Horton*, 33 La. Ann. 289 (1881). So, on a probate appeal, where the question was as to the intention with which a certain instrument was torn, verbal or written declarations were regarded as verbal facts assisting to constitute the *res gestæ*. *Collagan v. Burns*, 57 Me. 449 (1867). Where the defendant was the ringleader of the mob that killed the deceased, evidence of their exclamations, declarations, etc., are facts in the *res gestæ*, so far as they tend to show the intent with which the mob were acting. "They are regarded as verbal facts, indicating a present purpose and intention, and therefore admitted in proof like any other material facts." *Carr v. State*, 43 Ark. 99 (1884).

On an action for assault and battery, the abusive remarks made by the defendant when the plaintiff first came up which might be considered to reflect upon the plaintiff are part of the *res gestæ*. *Blake v. Damon*, 103 Mass. 199 (1869). In a criminal action for assault and battery, the language of the parties uttered at the time of the assault are part of the *res gestæ*. *Colquitt v. State*, 34 Tex. 550 (1871).

In *Insurance Co. v. Mosley*, 8 Wall. 397 (1869), more fully stated later, so far as declarations by the deceased as to his then present pains and injuries, made after the occurrence of some obviously great change in physical condition, were admitted by the court "as verbal acts, . . . as competent as any other testimony, when relevant to the issue," the action of the supreme court of the United States seems justified by the rule under consideration. It is when the court go further and admit the sufferer's statement as to the cause of his injury that the ruling is open to exception.

The distinction obviously is between a declaration which is competent as an independent fact in the *res gestæ* and a declaration which is admissible not because it is of itself part of the *res*

gestæ, but because it is part of some fact which assists to constitute the *res gestæ*. How easily such a distinction may be lost sight of may perhaps be illustrated by a case in the supreme judicial court of Massachusetts.

Wesson *v.* Washburn Iron Co., 13 All. 95 (1866), was an action for injury to the plaintiff's inn from a nuisance erected on the defendant's premises. Statements of guests on leaving the inn abruptly soon after arrival as to the reason of their leaving were held incompetent, because "merely declarations of a previously existing fact or state of things which operated on the minds of the persons who uttered them, and induced them to leave the house; but they had no tendency whatever to show that this act, of itself clear and unequivocal, should have any different signification or effect than that which should be given to it if proved as an independent fact, irrespectively of the statements which accompanied it." Wesson *v.* Washburn Co., 13 All. 95 (1866). While these declarations certainly did not characterize the act of leaving, the mental state of the guests was apparently itself a *res gestæ* fact, best proved by their declarations as to its existence.

In the same way, where the *intent* with which an entry is made on certain premises is material to the issue and part of the *res gestæ*, declarations of the party entering as to his intent in so doing is a verbal fact which may be proved by his declarations. The mere fact that the declaration is contemporaneous with the entry and tends to characterize it does not make the admissibility of the declaration dependent upon the admissibility of the fact of the entry. Dougherty *v.* McManus, 36 Ia. 657 (1873). Or for what purpose a bank deposit was made. Medley *v.* People, 49 Ill. App. 218 (1892). So, on a question whether an easement of a way had been acquired by adverse user, the declarations of a former owner of the land, while ploughing across the alleged right of way, that no right of way existed there, and that the user had been permissive, are competent, not as proof of the facts asserted, but as evidence *quo animo* the ploughing was done. Sears *v.* Hayt, 37 Conn. 406 (1870). So, whether a holding is under a claim of right. Smith *v.* Putnam, 62 N. H. 369 (1882). On a question of the settlement of a pauper, the intention with which he left a town being relevant to the issue, his declarations on the subject at the time of leaving are a fact in the *res gestæ*. Etna *v.* Brewer, 78 Me. 377 (1886). Where the question is as to the power of the husband as an agent to bind the wife as a grantor, her declarations to him as to the terms on which he was to deliver it are part of the *res gestæ*. Harper *v.* Dail, 92 N. C. 394 (1885). Statements of the intention with which A. removed a certain fence, made at the time of the removal, are competent in any case where this intention is material. Spencer *v.* New York, &c. R. R., 62 Conn. 242 (1892). So, what a grantee's agents said immediately

on learning of the making and delivery of the deed concerning the acceptance thereof is proper evidence to show his assent thereto. *Fischer Leaf Co. v. Whipple*, 51 Mo. App. 181 (1892). On an indictment for murder, evidence that the accused immediately after the homicidal act started off; that a bystander cried out, "Call the police!"; that thereupon the accused snapped his rifle at her, but did not fire, — is competent, as these facts assist to constitute the *res gestæ*. *Johnson v. State*, 88 Ga. 203 (1891). On an action brought by a water company against a town, the defendant claimed to show acts of the plaintiff testing and abandoning different sources of water supply as admissions by the plaintiff that the quantity of water furnished was insufficient. *Held*, that the plaintiff could show, in reply, by the record of corporate votes under which these tests were made, that their object was to improve the quality of the water. "The declaration of the purpose is a part of the doings of the corporation, by the authority of which the acts were done. It does not appear that at the time these votes were passed the present controversy had arisen. Apparently it is the common case of declarations accompanying acts which tend to explain or qualify the meaning of the acts, and which are considered as a part of the *res gestæ*." *Wiley v. Athol*, 150 Mass. 426 (1890), — which is apparently another instance of the same confusion of thought that appears in the earlier decision of *Wesson v. Washburn Iron Company*, 13 All. 95 (1866). The declarations were not competent because they accompanied a relevant fact, but because they were themselves relevant facts, and part of the *res gestæ*.

In the same way, as illustrating *purpose* on an action to restrain the lay-out of a highway across the plaintiff's land, the fact that while the plaintiff's predecessor was having the land surveyed he said he was not going to have a road on the west side of the land he was surveying was competent. *Tait v. Hall*, 71 Cal. 149 (1886).

On an action of trover for a plough, the defendant's intention in borrowing the same may be shown by his declarations at the time. *Frome v. Dennis*, 45 N. J. L. 515 (1883).

On an issue of the making of a contract to do a certain thing, a declaration to the defendant a few hours previous that he intended to do that particular thing is competent. "This declaration, it is claimed, was made a few hours before the alleged contract between plaintiff and defendant was consummated. It was admissible as a part of the *res gestæ* for the purpose of illustrating the subsequent agreement. It would not prove that a contract had been made, but was a circumstance from which the jury might reasonably infer that the defendant had sought the plaintiff for that purpose. So, too, would any declaration be admissible as a part of the *res gestæ* made by the defendant on his way to meet the plaintiff, that he was seeking him for a particular purpose. Such evidence would tend

only to show the object and purpose of the meeting; not that it had been accomplished. It was a circumstance which the jury had a right to consider in connection with the evidence of the settlement." *Garrison v. Goodale*, 23 Oregon, 307 (1892).

A statement by the lender made during the making of a loan that he is lending some one else's money is part of the *res gestæ*. *Carter v. Beals*, 44 N. H. 408 (1862). The objections of a wife, made before and at the time of giving her acknowledgment, though at an interval of several hours, are part of the *res gestæ*. *Louden v. Blythe*, 16 Pa. St. 532 (1851). So the declarations of a party on receiving money that he does not accept it in full payment. *Dillard v. Scruggs*, 36 Ala. 670 (1860). Where the intention with which a pregnant woman visited a doctor's office is material, her declarations on that point when leaving home are part of the *res gestæ*. *State v. Howard*, 32 Vt. 380, 404 (1859). In an action for alienating a wife's affections, her declarations on leaving home, and on arriving at her father's house "explanatory of her troubled mental condition and of her reasons for going to her father's house" are competent "as parts of the *res gestæ*." *Glass v. Bennett*, 89 Tenn. 478 (1890). Where the question is as to the fairness of the presiding officer of an election when votes were challenged as illegal, his declarations and conversations made at that time are part of the *res gestæ*. *Little v. State*, 75 Tex. 616 (1890).

Where it is important to show that a city had notice of the dangerous condition of a certain shade tree within the limits of the highway, the declarations of persons as to its dangerous character, while looking at its decayed roots at a time when they were exposed, are facts in the *res gestæ*. "The acts of persons in looking at the roots were an important part of the evidence. From this it might be inferred that they noticed the decayed condition of the roots, and so that knowledge of the defect became general. But that evidence might properly be strengthened by introducing as a part of the *res gestæ* the declarations which accompanied the acts, and which characterized them as acts that communicated intelligence of the condition of the tree to those who looked. The remarks made at the time rendered it certain that the view of the roots gave notice of the defect to those who then saw them. If the fact that these persons looked at the decayed roots was competent as tending to show the notoriety of the defect, then clearly the accompanying declarations which tended to show the nature of the act of looking were also competent." *Chase v. Lowell*, 151 Mass. 422 (1890).

The remark with which one of the participants in a mutual assault set out to clinch his antagonist is admissible as part of a *res gestæ* fact. *Baker v. Gausin*, 76 Ind. 317 (1881). Such statement on an issue of self-defence would probably be admissible as itself a fact in the *res gestæ* as indicating *intention* to injure. *Ibid.* The declara-

tion of a bystander, calculated to affect the action of the defendant if made at the time of the affray, is equally a fact in the *res gestæ*, for the same reasons. *Ibid.* Where a man, claiming to have been robbed, ran calling for the police, the facts that he met a policeman; told him his story; that they went back and found the defendant counting certain money by the aid of street lamp, "were admissible as part of the *res gestæ*. The whole was practically one continued and brief transaction, and all that took place was of some consequence in construing the conduct of both parties." *Driscoll v. People*, 47 Mich. 413 (1882).

So the declaration of a party that he considered a boundary line settled may be competent evidence as bearing on his purpose in having a re-survey. *Archer v. Helm*, 70 Miss. 874 (1893).

On an indictment for rape, where the identity of the prisoner with the assailant is involved, the fact that certain witnesses of the assault recognized the accused next day as the person in question is competent; and the exclamation of one of these witnesses to the other, "There goes the man," and the reply of the other, "Yes, there he goes," are competent as part of the *res gestæ*. "It is not questioned that it was perfectly competent to show that the witnesses saw and readily recognized the accused, near the scene of the transaction, on the following day, as testified to by them, and it must be admitted the spontaneous exclamation, 'There goes the man,' with the response, 'Yes, there he goes,' is highly characteristic of the fact of their recognition. The true test, in all cases, by which the admissibility of such testimony is determined, is, the act, declaration or exclamation must be so intimately interwoven or connected with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony, and we are of opinion the circumstances of this case clearly bring it within the rule." *Lander v. The People*, 104 Ill. 248 (1882).

DECLARATIONS PART OF A RES GESTÆ FACT. — Declarations which constitute the *res gestæ* and those whose existence forms independent facts in the *res gestæ* are admitted in evidence as verbal facts and upon ordinary principles. Even where the declaration is that of a person not called as a witness, the rule excluding hearsay does not apply. The fact of a statement having been made (as distinguished from the truth of what is stated) differs in no essential particular of proof from any other fact equally competent. The hearsay rule, however, does exclude the statement of persons not witnesses as proof of the facts therein stated, except in certain specified instances. The statements excluded by the hearsay rule which, on an exception to the operation of that rule, are admitted as part of the *res gestæ* are those which are not themselves facts in the *res gestæ*, but are part of some fact which is itself part of the *res gestæ*.

It is probably with this in mind that the court in *Mitchum v. State*, 11 Ga. 615 (1852) say "The idea of the *res gestæ* presupposes a main fact."

To make a declaration in a person's own favor admissible as part of the *res gestæ* "it is essential that the act which such declaration characterizes or explains should itself be admissible. . . . If such act is not admissible in evidence, its actual admission, without objection, does not render the accompanying declaration competent." *Pinney v. Jones*, 64 Conn. 545 (1894).

"The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declaration from mere hearsay. . . . There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." *Lund v. Tyngsborough*, 9 Cush. 36 (1851). The acts of a testator in collecting, drying, and pasting together the parts of a torn will being part of the *res gestæ*, his declarations while engaged on this work that "the old woman had got in one of her tantrums, and had torn it, but that he could fix it together again" are competent. *Collagan v. Burns*, 57 Me. 449 (1867). "Declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify, or explain them, and are apparently natural and spontaneous." *Cox v. State*, 64 Ga. 374, 410 (1879).

A declaration to be "part" of such *res gestæ* fact must (1) accompany it (2) explain or characterize it. Both these elements are essential. They represent the guarantees of reliability on which the operation of the rule excluding hearsay has been suspended.

(1) **MUST BE CONTEMPORANEOUS.** — To admit evidence of a declaration, otherwise excluded, on the ground that it is part of a relevant act or other fact in the *res gestæ*, it is necessary that the declaration should accompany the act. The difficulty at once presents itself that to limit the rule to a precise coincidence in time would be to abrogate it for all practical purposes. A certain amount of leeway is therefore necessary and the question largely becomes one of degree.

"To bring such declarations within this principle generally, they must be contemporaneous with the main fact to which they relate." *Insurance Co. v. Mosley*, 8 Wall. 397 (1869). "When the act is one material and relevant, and proper for the consideration of the jury, the declarations of the actor accompanying and explanatory of the acts done, are uniformly admissible as part of the *res gestæ*. *Collagan v. Burns*, 57 Me. 449 (1867).

So the supreme court of Iowa, in admitting the declaration of a passenger as to the extent of his injury "at the time of the over-

turning" of the coach. "According to the authorities, if such a declaration was made at the time the act was done, and is calculated to explain the character, nature or quality of the facts constituting the act and its effects, so as to unfold and harmonize them as parts of the same transaction, then such a declaration must be regarded as a part of the *res gestæ*, and may always be shown to the jury along with the principal facts." *Frink & Co. v. Coe*, 4 Greene, 555 (1854).

On an action against a refiner of petroleum for selling improper oil, by means of which the plaintiff's husband was killed, what the latter said when enveloped in the flames or immediately after as to the cause of the accident "was clearly competent evidence as a part of the *res gestæ*." *Elkins v. McKean*, 79 Pa. St. 493 (1875).

Where a witness, being alarmed in the night, ran from her room, her exclamation "that she saw some one at the window in her room" is competent as part of the *res gestæ*. *Dismukes v. State*, 83 Ala. 287 (1887).

"Declarations which accompany the act characterize it; but to do so the declarations must be by the persons engaged in the act, contemporaneous with it, if not precisely concurrent in point of time, and proved as other facts by witnesses. To make declarations a part of the *res gestæ* they must be contemporaneous with the main fact, not, however, precisely concurrent in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous." *State v. Belcher* 13 S. C. 459 (1880); *Mitchum v. State*, 11 Ga. 615 (1852). The exclamation of the prisoner immediately after the killing, "I would not have done it for the world!" is competent as part of the *res gestæ*. *Ibid.* "The transaction upon which this action is founded is the alleged enticing of the plaintiff's daughter from her home by the defendants. That is the *res gestæ*, and all that was said or done by the actors in that transaction contemporaneous with it, and which tends to illustrate its character, are parts thereof, and as such may be proved on the trial by either party." *Felt v. Amidon*, 43 Wis. 467 (1877).

AN EXTENDED DEVELOPMENT. — As compared with the English decisions, the rules regulating the admission of declarations as part of a *res gestæ* fact have received an extended development in the United States. It being conceded not to be strictly necessary that the declaration absolutely accompany the act of which it is part, it has proved difficult in many cases accurately to distinguish between mere narrative of a completed transaction (which is excluded) and a declaration rapidly succeeding an act, — compelled and as it were instinctively forced out by the act itself. In the absence of a more definite test in point of time, many tribunals have practically substituted another test, — that of *spontaneity*. They receive "as part

of the *res gestæ* "the story of events recently past, provided that it sufficiently appears that there is neither time nor motive for misrepresentation or invention. Most of these authorities rest ultimately upon a Massachusetts case, — *Com. v. M'Pike*, 3 Cush. 181 (1849).

COM. v. M'PIKE. — This leading case can hardly be said to have been apparently one of much consideration by the court, and possibly, but for its adoption by the majority of the supreme court of the United States in *Insurance Co. v. Mosley* as the basis of their decision, might not have been heard from again. The court which rendered the decision a few years later announced a much sounder legal principle in *Com. v. Hackett*, 2 All. 136 (1861). As a matter of reasoning, it is difficult to follow the court in *Com. v. M'Pike* in seeing of what *res gestæ* fact the declaration actually admitted was claimed to be part; unless the principle be announced that the mental or physical state of a declarant resulting from the *res gestæ*, then past, be itself a fact in the *res gestæ*, and, further, that declarations of the person in question accounting for the existence of such state shortly after its creation are part of such state, characterizing and explaining it. For such a general principle there is no basis of authority, except as furnished by these decisions themselves.

The case was one of indictment for manslaughter. The deceased, a woman, between twelve and one o'clock in the morning of July 5th, 1848, ran from her sleeping-room, where the injury was inflicted, to the room of a witness on the story above and knocked on the door, crying "Murder!" This outcry attracted the attention of a second witness, who at once got up from bed, to go up-stairs to her relief, but, being dissuaded by the first witness, then coming down-stairs in search of a priest and physician, went for a watchman instead. On returning, the second witness went immediately up to the room above where the deceased then was. After certain requests, the deceased then told the witness that she had been stabbed by her husband, the accused. This was held competent by the court in the following language: "The witness describes the situation in which he found the party, her appearance, and her request for assistance, and, in connection therewith, her declaration of the cause of the injury. The period of time, at which these acts and statements took place was so recent after the receiving of the injury, as to justify the admission of the evidence as a part of the *res gestæ*. In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge." *Com. v. M'Pike*, 3 Cush. 181 (1849).

INSURANCE CO. v. MOSLEY. — The rule in *Com. v. M'Pike* (*ubi supra*) was followed in *Insurance Co. v. Mosley*, 8 Wall. 397 (1869), which is here summarized substantially in the language used in a most helpful series of articles upon this subject in 15 Am. Law

Rev. 86 et seq. *Insurance Co. v. Mosley* was an action of assumpsit on a policy of insurance issued by the plaintiff in error to the defendant upon the life of her husband. The case came up by writ of error to one of the circuit courts of the United States. The question was as to the soundness of two rulings in the court below upon points of evidence. The policy insured against death resulting from personal injury, "caused by some outward and visible means;" it was expressly provided that the policy should not extend to any injury "caused by or arising from natural disease." The declaration alleged that the deceased died from injuries that resulted from falling down a pair of stairs. The defendants (below) pleaded the general issue. The question was whether the cause of the deceased's death was accident or disease. He was "in his usual health" until a certain night when, after having gone to bed, he got up and went down stairs; he returned ill, and complained of having had a fall, describing his symptoms, and he continued ill for three or four days until he died. The testimony which was objected to was: (1) That of Mrs. Mosley giving the declaration of her husband. She testified that he got up between twelve and one o'clock at night, and went down-stairs to the privy; she did not know how long he was gone; when he came back he said he had fallen down the back stairs, had hit and hurt the back of his head, and almost killed himself; his voice trembled so as to attract her attention at once; he complained, and appeared to be in pain, and was sick, and she was up with him all night. On the next morning he said he "felt bad," and fainted. (2) The testimony of the son of the deceased, giving certain declarations of his father, was also objected to, but received. He testified that he slept in the lower part of the building; that at about twelve o'clock of the night in question he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly. That on the day after the fall his father said he felt very badly, and that if he attempted to walk across the room his head became dizzy; on the following day he said he was a little worse, if anything. Nobody testified to seeing the deceased fall. The majority of the court, Swayne, J. giving the opinion, state the questions to be whether the court erred in admitting the declarations of the deceased (1) as to his bodily injuries and pains, and (2) to prove that he had fallen down-stairs. The first class of declarations they readily conclude to be admissible, as being the usual expressions of such feelings, and as relating wholly to what was present. The other question is answered in the same way, on the ground that the declarations were made immediately or very soon after the event, — some of them before the deceased returned to his room and the others upon reaching it. Both declarations are conceived to be "a part of the *res gestæ*." "In

the complexity of human affairs," say the court, "what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. . . . Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence, and its extent and character." Seven cases are relied upon, including *Aveson v. Kinnaird*, *Com. v. M'Pike*, *Thompson v. Trevanion*, and *R. v. Foster*.

Mr. Justice Clifford (with whom Nelson, J., concurred), dissented in an opinion which is devoted to a consideration of the declarations as evidence to prove the falling down-stairs. It is insisted that the declarations were not contemporaneous with that fact. The case of *Com. v. M'Pike* is condemned, as inconsistent with all other Massachusetts cases; *Thompson v. Trevanion* and *R. v. Foster* as very slightly reported, as disapproved by Roscoe in "his valuable treatise on the Law of Evidence," and as inconsistent with all the tests laid down in Taylor.

It seems difficult to support this case upon the facts as reported, in so far as it admits the declarations as to the fact of falling down-stairs. There is nothing whatever to show how long the interval was between the going down of the deceased and his return, and nothing definite to show the interval between his going down and the interview with the son. There is no evidence that either the son or the wife, or anybody, heard the fall; and the wife says expressly that "she didn't know how long he was gone." The interval may have been five minutes, or fifteen, or thirty. It seems impossible to say that such a declaration is shown to be contemporaneous with the cause of the injury, — so near it that it may fairly be called a part of it; yet the court make the declaration admissible, as being connected with the "bodily injury," and as stating the cause of it almost contemporaneously with its occurrence.

It certainly is extremely difficult to see of what *res gestæ* fact the declaration admitted can fairly be said to be a part.

The decisions in California apparently follow the rule laid down in *Com. v. M'Pike* and *Insurance Co. v. Mosley*.

Where a witness heard a shot and "about half a minute and not exceeding three quarters of a minute from the time witness heard the first shot" met deceased walking rapidly away from the prisoner's house and was informed of the circumstances of the shooting, held: these declarations were admissible. "Declarations to be a part of the *res gestæ*, are not required to be precisely concurrent in point of time with the principal fact, if they spring out of the

principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous, and are admissible." *People v. Vernon*, 35 Cal. 49 (1868).

Such a ruling labors under the difficulty stated above. It is hard to see of what *res gestæ* fact the declarations in question are part. Certainly they were not part of the fact of shooting; as to this they are mere narrative.

So in Virginia. The statement of a prisoner to a witness on his own behalf made a few minutes after the fatal shot, on the scene of the *res gestæ*, is admissible. "It was very closely connected, both in time and place, with the homicide, which was the subject of the prosecution, and might well have tended to elucidate that fact as part of the *res gestæ*. It was said when the deceased was lying close by, in a dying state, from the effect of the wounds he had received, and in the presence, and it seems the hearing, of Columbus and Gilbert Little, the former of whom had a pistol in each hand and the latter a gun in his hand, and also in the presence and hearing of Oscar Little, who was also wounded. It is not probable that the prisoner had either time or motive to fabricate a statement under such circumstances." *Little's Case*, 25 Gratt. 921 (1874). Where a party murderously assaulted ran to the door calling "murder," walked around the house some eighty feet to a neighbor's house; roused the latter who was asleep and, on being admitted said "I am shot; William Kirby has shot me;" it was held that the declarations were competent. "Here, the declarations in question were not only made recently, but probably within two minutes, after the shot was fired. And this, taken in connection with the declarant's condition, mental and physical, produced by the unexpected, unprovoked, and, as he supposed, fatal shot through the head, repels the idea that his declarations were fabricated. Indeed, under the circumstances disclosed by the record, it is hardly reasonable to suppose that they could have been fabricated, as both the time and capacity for reflection were wanting." *Kirby v. Com.*, 77 Va. 681, 689 (1883).

And Texas. Where deceased, immediately upon being shot staggered into the house, asked his wife to examine his wound, and when she told him the ball had passed through his body, exclaimed "I am a dead man, but, thank God, I die innocent;" and, in reply to her question, "who did it, Bob?" replied "Morg. McInturf (the defendant) and them," the declarations were held admissible as part of the *res gestæ*. *McInturf v. State*, 20 Tex. App. 335, 355 (1886); *Drake v. State*, 29 Tex. App. 265 (1890). In a Texas divorce case a witness was allowed to testify "that the plaintiff came to her house crying, and said defendant had

just slapped her and called her a bitch. . . The witness further stated, that appellee's face was red on one side, and that she had just come from home to witness' house, about 300 yards away. Under the circumstances, the statement made by appellee was *res gestæ*." *Hanna v. Hanna*, 3 Tex. Civ. App. 51 (1893).

This idea that where a statement is not tainted with liability to fabrication it is admissible as part of the *res gestæ* although not part of any particular *res gestæ* fact has been adopted in legislation. Georgia Code, § 3733. "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of *res gestæ*." Commenting on this provision, the court in *Travellers Ins. Co. v. Sheppard*, 85 Ga. 751, 775 (1890) say;—"The rule contemplates that all the *res gestæ*, including declarations forming part thereof, must transpire within the present time of the transaction. But that time, while it cannot be less, may be more extended than the present of the principal fact, in some instances a little, in others much, and in others very much more. Usually if they can all be ascertained, some of the *res gestæ* will be found simultaneous with, and some anterior and others posterior to the principal fact. Thus, suppose an electric discharge during a summer shower to be the principal fact, the formation of the cloud, the falling of the rain, the thunder and its reverberation would all, for some purposes, be within the *res gestæ* of the event, though the principal fact was but a flash of lightning. This example may serve as a figure to characterize the instances in which declarations subsequent to the fact are receivable in evidence. Let thunder represent mental impressions produced by the event. Then reverberation will represent admissible declarations reporting these impressions. It will represent them by a close analogy in two respects, first in being speedy, second in being spontaneous. That they shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy. There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declarations must be the utterance of human nature, of the genus homo, rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be a sufficient sanction for the speech of man as such, man as distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time

being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy." *Travellers Ins. Co. v. Sheppard*. 85 Ga. 751, 775 (1890).

The case of *Com. v. M'Pike* (*ubi supra*) has even been relied on to sustain a ruling that on an indictment for murder the defendant can prove as part of the *res gestæ* what he told his mother on his return home, bleeding, weak, and nauseated, between ten and thirty minutes after the fatal stabbing. *Craig v. State*, 30 Tex. App. 619 (1892). "Just when a fact or statement is or is not a part of the *res gestæ* is one of the most difficult questions to solve known to the writer. The old rule was, that to be part of the *res gestæ* the fact or statement should be contemporaneous with the transaction, and this rule is approved by many courts of the first ability. On the other hand, the rule has been construed so as to admit acts and declarations occurring not contemporaneously with the transaction, but which precede or follow it. . . . The rule we may understand, but in its application the difficulties arise." *Ibid*. On the other hand, in a Virginia case very similar to *Craig v. State* in its facts, where A. claimed to have been robbed by the defendants, his declarations to a witness ten minutes after, some distance from the scene of the *res gestæ*, are incompetent. The court adopt with approval a sage statement from Mr. Wharton (*Crim. Evid.* 9 ed. Dec. 26). "As soon as we pass the line which distinguishes between the transaction talking of itself, and talking as modifying the transaction, — in other words, as soon as we pass the line between the time of the transaction and the time that follows it, we have no limits that can be imposed. If we are to receive declarations made ten minutes after a transaction, we must receive declarations made ten years afterwards. The impulses of anger, or it may be of ungrounded suspicion, may, in many minds, operate even more effectively and passionately, ten minutes after an injury, than they would after ten years had elapsed." *Jones v. Com.*, 86 Va. 740 (1890).

NEGLIGENCE CASES. — Following out the line of thought exemplified in *Com. v. M'Pike*, *Insurance Co. v. Mosley* and similar cases, that a spontaneous declaration by a party not a witness, made soon after an occurrence, is admissible even if it is only a story about the occurrence itself, many cases, more particularly actions of negligence against a corporation, apparently admit any statement made prior to the period of invention; *i. e.* of the time when a plaintiff begins to think of his rights or a defendant to consider how to evade liability.

So long as the mind of the declarant may fairly be assumed, in the discretion of the court, to be so filled with and controlled by the recent transaction as to make his statement an instinctive outcome of the event itself rather than the result of thought, in which the

anticipation of consequences may be expected to exert an influence, the statements are, it is said, to be taken as part of the *res gestæ*. Thus where a freight train had injured certain horses on the track, a statement by the engineer to the conductor as to when he first saw the horses, "made immediately after the accident, by one person then engaged in the defendant's business to another similarly employed, in reference to what had just occurred, and what they were then at in consequence of such occurrence, there not appearing any cause other than such occurrence to produce or influence the declaration, was connected with, and grew directly out of, the main fact — the accident — so as to be a part of the same transaction" was held admissible. *O'Connor v. Chicago, &c. R. R.*, 27 Minn. 166 (1880).

What a brakeman, negligently injured by defective machinery and backing the defendant's locomotive, said within two minutes of the injury, while in presence of the train and the defective machinery is part of the *res gestæ*. "Declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they are yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself." *Louisville, &c. R. R. v. Buck*, 116 Ind. 566 (1888); *Texas, &c. R. R. v. Robertson*, 82 Tex. 657 (1891). In a case against a railroad for the acts of a brakeman in knocking the plaintiff from a moving train, the statements of the injured person to the person who first reached him seven minutes after the accident as to the circumstances accompanying and preceding his injury are competent. "The declarations under consideration were made at the place of the accident and within a very few minutes after it occurred, and while the plaintiff was still writhing under the pain inflicted by it." *International, &c. R. R. v. Anderson*, 82 Tex. 516 (1891). The court in this case, after expressing an apparent regret at the extension of the *res gestæ* rule state the rule authorizing the reception of this class of evidence as follows: — "Another rule, applied in many of the American courts at least, is to admit as parts of the *res gestæ* not only such declarations as accompany the transaction, but also such as are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterance of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." *Ibid.* On similar grounds, the declarations of the conductor (Fish) of a train just wrecked as to the running time he supposed he had is admissible in an action against the company by a passenger injured in the collision. "The declarations of Fish were made within a few

seconds after the casualty, in view of the wrecked train, and amidst the search for persons whose fate was then unknown, and while Ginther (the plaintiff's intestate), who lived but thirty minutes, was dying from the injuries he had received. He had no time to contrive or devise a falsehood by which to exonerate himself from blame." *McLeod v. Ginther's Adm.* 80 Ky. 399 (1882). In the case of *Hanover R. R. v. Coyle*, 55 Pa. St. 396, 402 (1867), where a peddler's wagon was struck and the peddler injured by the negligence of the engineer, the latter's declaration, made after the infliction of the injury, was admitted as a part of the transaction itself, the court saying; — "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of goods strewn along the road by the breaking up of the boxes; and it seems to have grown directly out of, and immediately after, the happening of the fact." In an action against a railroad company for negligence in running over one Leverett, a brakeman, his explanation of the cause and manner of the injury, while still under the car which ran over him is competent as part of the *res gestæ*. "The statement of Leverett was made immediately after he was run over, and while the wrong complained of was incomplete, he being still under the car, and was a part of the *res gestæ*, and fairly goes to explain the cause of the condition in which he was at the time it was made. It was an emanation of the act in question, and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement, impress the mind with confidence in its truth. It was competent evidence." *Little Rock Ry. Co. v. Leverett*, 48 Ark. 333 (1886). Where a passenger was ejected by a brakeman from the ladies' car, the conversation between the plaintiff and the offending brakeman "almost immediately after" the plaintiff's expulsion from the car is competent as part of the *res gestæ*. *Bass v. Chicago, &c. R. R.*, 42 Wis. 654, 671 (1877). Where a passenger was injured by being thrown from a car, what was said by him "immediately after the train passed, and while he lay on the platform where he fell. It was, under the authorities, a part of the *res gestæ*. It differs from the declaration which was reported in *Ogden v. R. R.*, (44 Leg. Ind. 133) as that was made after the removal of the injured party from the place where he was found; in this case, it was made while the party was lying where he fell and an instant after his fall." *Pennsylvania R. R. v. Lyons*, 129 Pa. St. 113 (1889).

On an action of negligence against a firm of tin roofers for negligently burning plaintiff's building by the escape of sparks, what the defendant's servants said as to the cause of the fire, made during its progress, is competent. *Shafer v. Lacock*, 168 Pa. St. 497 (1895).

A stricter rule, and one more defensible in point of principle, has been laid down in Mississippi, that "it is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth; the true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent." *Mayes v. State*, 64 Miss. 329 (1886). In that case, where the deceased, who had fled after receiving the fatal injury, was approached by a witness about five minutes after being cut, his statement as to the defendant's having done the injury is incompetent. "We think . . . the statements of the injured party were not of the *res gestæ*; that they found no support or credence by reason of anything being done, but owe their whole force to the credit of the declarant, and therefore should have been excluded by the court." *Ibid.*

The supreme court of the United States by a divided court has also declined to follow this modern extension. *Vicksburg R. R. v. O'Brien*, 119 U. S. 99 (1886), is a leading case in this connection. The action was against a railroad for negligence, causing injury to the original plaintiff's wife by overturning the car in which she was riding. Plaintiff offered the evidence of a witness that he had a conversation with the engineer in charge of the train about the rate of speed at which the train was going. The evidence was admitted over defendant's objection. Witness said that between ten and thirty minutes after the accident he had a talk with the engineer, and the latter told him that the train at the time of the accident was going eighteen miles an hour. Held, error. Harlan, J., for the court says: "It (the declaration) did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ* — simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it."

Four judges dissent in an opinion by Field, J., and conclude, that in view of the short time which had elapsed, and from the fact that the statement was made in view of the wrecked train and when the engineer was surrounded by excited passengers, that it was admis-

sible as part of the *res gestæ*. The modern doctrine as to the *res gestæ*, the minority say, has relaxed the ancient rule. "It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it." *Vicksburg, &c. R. R. v. O'Brien*, 119 U. S. 99 (1886).

THE SOUNDER DOCTRINE. — The doctrine that a narrative, even if recent or even instinctive, can be so far part of the fact which the declaration describes as to be admissible under the exception to the hearsay rule admitting declarations as part of the *res gestæ* seems not to have been universally approved. It is doubtful whether *Com. v. M'Pike* would be followed in Massachusetts. The sounder doctrine, that a declaration to be admissible as part of the *res gestæ*, must constitute part of some fact in the *res gestæ*, is affirmed in a later Massachusetts case, — *Com. v. Hackett*, 2 All. 136 (1861), — which, although somewhat similar in its facts to *Com. v. M'Pike*, falls on the other side of the line and apparently enunciates the correct rule. The case was murder by stabbing. A witness was allowed to testify that on the street, in the night, he heard the deceased cry out, "I'm stabbed;" that he at once went to him and reached him in twenty seconds, and that the deceased said: "I'm stabbed — I'm gone — Dan Hackett [the defendant] has stabbed me." The evidence was that the defendant had suddenly come upon the deceased, had stabbed him twice, and had run away. This case was elaborately considered; the court gave it "the most anxious and careful consideration, not only on account of [its importance], but because the exception is urged with great earnestness and apparent confidence." The court (Bigelow, C. J.) say that the rule in regard to declarations part of the *res gestæ* has been often loosely administered, but that "the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony." "The objection to the admission in evidence of the declarations of the deceased, made immediately after the infliction of the alleged mortal blows, is put on the ground that it was a mere narration of a past event, uttered in the absence of the defendant, and therefore in its nature essentially hearsay testimony. If we regarded only the form of words in which the declaration was made, this objection would be well founded. The language used by the deceased apparently referred to an event which had passed. But this is by no means a decisive consideration. The argument would have been equally strong, in case the words had been uttered as soon as the knife had been withdrawn from the body of the deceased, if it had appeared that, from any cause, the defendant could not then have heard them. But it is necessary, in order to determine the question of the competency of this evidence, to regard not only the language used, but also the circumstances under which it was uttered. If it was a narrative

statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declaration or exclamation of the deceased may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted. It was not therefore an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*. The true test of the competency of the evidence is not, as was urged by the counsel for the defendant, that it was made after the act was done, and in the absence of the defendant. These are important circumstances, entitled to great weight, and, if they stood alone, quite decisive. But they are outweighed by the other facts in proof, from which it appears that they were uttered after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to receive credit and support as one of the circumstances which accompanied and illustrated the main fact, which was the subject of inquiry before the jury." *Ibid*.

Of what *res gestæ* fact is the declaration in Hackett's case part? The declaration was clearly not of itself a fact in the *res gestæ*. If admissible, it must be as forming part of such a fact, accompanying, illustrating, necessary to its being understood. Apparently the fact of stabbing is such a fact. In Hackett's case the declaration did not accompany, as in M'Pike's case, the mere description or existence of a condition produced by the *res gestæ*, then over; it illustrated, and from its proximity and nature formed in a legitimate sense part of the fact of stabbing. The first exclamation clearly was of that nature. The second declaration, if made while the assailant was withdrawing the knife from the body of the deceased, and prepared to renew the assault, would clearly have been part of the stabbing. If made while the deceased was himself withdrawing the knife from the wound it would have been part of the *res gestæ* fact of stabbing. If so, the length of the interval between the two declarations and the nature of the exclamation, an apparent continuance of the first outcry, still leave the second declaration a legitimate part of the act of stabbing. Nice questions of degree may arise, but it would seem as if the test would always be: Is the declaration offered itself a *res gestæ* fact or a legitimate part of a fact in the *res gestæ*.

It will be noted that in many particulars the case of *Com. v. Hackett* (ubi supra) is not unlike that of *R. v. Bedingfield*, 14 Cox Cr. C. 341 (1879). Under the ruling in that case, the exclamation in *Com. v. Hackett* (ubi supra) would probably have been rejected. As defined by Lord Chief Justice Cockburn in a pamphlet concerning the case, "the term '*res gestæ*,' as applied to a criminal case," is: "Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, — whether on the part of the agent or wrong-doer, in order to its performance, or on that of the patient or party wronged, in order to its prevention, — and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive, — as, e. g., in the case of flight or applications for assistance, — form part of the principal transaction, and may be given in evidence as part of the *res gestæ*, or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer, — such as, e. g., statements made with a view to the apprehension of the offender, — do not form part of the *res gestæ*, and should be excluded." *Bedingfield's Case*, 14 Amer. Law Rev. 822 (1880).

If this is the law of England, which may be doubted, it certainly lays down a stricter rule than has been adopted by any American jurisdiction. Unless there be something implied in the "constructive" action of the wrongdoer, his actual absence from the scene of the *res gestæ* (even though unknown to the declarant) cannot be adopted as the decisive test of the admissibility of such a declaration. If we have a relevant fact, admissible as part of the *res gestæ*, and, accompanying it, such a declaration as to be in a just sense part of it, the declaration is admissible, though an appreciable interval of time has elapsed.

In *Equitable &c. Association v. McCluskey*, a case similar in its facts to *Ins. Co. v. Mosley*, 8 Wall. 397 (1869) the plaintiff was not permitted to state declarations of the deceased made at the moment of his being drawn out of the mine in which he was said to have been injured. After referring to the dangers of hearsay evidence, the court proceed: — "The most dangerous exception ingrafted upon the rule is that which admits the declarations of a party, or an agent, uttered at the time of the principal transaction, and therefore taken to be a part of it, because it is supposed to be illustrative and evi-

dence of the principal fact which is the subject of the inquiry. It probably had its origin in the trouble sometimes experienced in criminal cases to identify the perpetrator of a crime. The desire of the courts to prevent what would be an evident miscarriage of justice gradually led to the extension of the rule to civil controversies; and it is possibly as well settled as any of the rules of evidence, that the declaration of a party made at the time of an act which may be given in evidence, if it be calculated to explain, qualify or characterize the act itself, and is so connected with it that it may be taken as a part of one and the same transaction, and is in no sense a narrative of something which has passed, may be proven as a part of the *res gestæ*. Courts have gone a long distance in the application of the rule to particular facts, but, for the purpose of this opinion, it is wholly unnecessary to call in question or criticise the extreme cases, or to attempt the statement of any general principle, or limit its application. It is enough to hold, which is as far as this opinion goes, or is intended to go, that the declarations offered in evidence were not under any of the well considered cases a part of the *res gestæ*." *Equitable, &c. Ass. v. McCluskey*, 1 Col. App. 473 (1892). The statements of a woman suffering from arsenical poisoning are not competent. "Any statement made by Mrs. Barnaby at the time of taking the fatal dose, or so soon thereafter as to make the declarations a part of the transaction and explanatory of that act, was admissible. But with a single exception the statements are not of this character, and consequently the evidence should not have been allowed as part of the *res gestæ*. It is not only hearsay, but hearsay evidence of the most objectionable kind. Under claim that it was part of the *res gestæ*, witnesses were permitted to detail statements made by Mrs. Barnaby that would not have been receivable in evidence, if she had recovered and appeared as a witness upon the stand, against the defendant upon a charge for a lesser offence." *Graves v. People*, 18 Col. 170, 177 (1893).

While it is necessary that the declaration be practically contemporaneous with the act of which it is part, it is not required that it be contemporaneous with the principal act in the case. "The fact that the acts given in evidence occurred previous to the time when the murder was committed, can make no difference as to the rule. If the acts of the accused done before the commission of the crime with which she is charged are competent evidence tending to show that she committed such crime, then what was said at the time the act was done is also admissible, as explanatory of the same, and as indicative of the intent or object of the act." *Mack v. State*, 48 Wis. 271 (1879).

The exclamation of the deceased at the moment of receiving the fatal injury, "Banks has shot me," is competent. *State v. Banks*, 10 Mo. App. 111 (1881).

NARRATIVE EXCLUDED. — As a mere narrative of past transactions cannot accompany and assist in constituting some fact in the *res gestæ*, it is excluded as simple hearsay. *Ross v. White*, 60 Vt. 558 (1888); *Doles v. State*, 97 Ind. 555 (1884); *Waldele v. New York &c. R. R.*, 95 N. Y. 274 (1884); *Petrie v. Columbia &c. R. R.*, 27 S. C. 63 (1887); *Lund v. Tyngsborough*, 9 Cush. 36 (1851); *McKinnon v. Norcross*, 148 Mass. 533 (1889). Mere nearness of time does not affect the rule. The first statements of a person after being shot through a window as to who shot him, made about five minutes after the shooting, are neither themselves part of the *res gestæ* nor admissible as part of any *res gestæ* fact. They are mere narrative. "They in no manner served to illustrate the main fact, the shooting. The chief purpose of them was to show, not that the deceased had been shot, or the manner in which, or the circumstances under which, but the person by whom, it had been done. . . . They were the simple statements of the deceased, narrative of what had already transpired." *Jones v. State*, 71 Ind. 66 (1880). "The length of the interval of time between the main fact and the statements cannot be important, if such time elapsed as to make the statements, having regard to their form and substance, mere narration." *Ibid.* That only a minute elapsed does not alter the rule. *King v. State*, 65 Miss. 576 (1888).

So what the defendant's engineer said just after the accident is not competent. "Any statement the engineer might have made would have been concerning a past and completed transaction, and hence, would have been incompetent evidence against the railway company to prove the manner and cause of the decedent's death. The fact that the statement was made in five minutes after the accident would not render the evidence admissible, if the conversation referred to a past occurrence, and not connected with the *res gestæ*." *Tennis v. Rapid Transit Ry. Co.*, 45 Kansas, 503, 509 (1891). So of statements by an injured man made soon after being struck. "The *res gestæ*, speaking generally, was the accident. These declarations were no part of that — were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations." *Waddele v. N. Y. &c. R. R.*, 95 N. Y. 274 (1884).

In an action for damages caused by the collision of two teams, the statements of the driver of one team to third parties "shortly after the injury" are not part of the *res gestæ*. "If contemporaneous with the main fact under consideration, they would be admissible,

but if made after the injury was done, and after the transaction had terminated, they would not be." *Mabley v. Kittleberger*, 37 Mich. 360 (1877). The statement of a passenger compelled to jump from a moving train, as to the circumstances of his injury, made half an hour after their occurrence, to one attracted by his cries is not part of the *res gestæ*, but mere narrative. *Savannah, &c. R. R. v. Holland*, 82 Ga. 257 (1888). So where a boy, after being pushed from a street car, got up, walked to the sidewalk and sat down, his statement as to the cause of his injury made during or just after the sitting down is mere narrative and no part of the *res gestæ*. "The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or part of a history of a completed past affair. In the one case it is competent, in the other it is not." *Chicago, &c. R. R. v. Becker*, 128 Ill. 545 (1889).

What the plaintiff said to his doctor, who had driven a dozen miles to treat him at his house, as to the cause of his injury is hearsay. *Fordyce v. McCants*, 51 Ark. 509 (1889).

Where a child was killed by the negligence of the railroad company, the mother's declarations immediately after the accident are mere hearsay. *Norfolk, &c. R. R. v. Groseclose*, 88 Va. 267 (1891).

The statement of the engineer in charge of the train causing the injuries complained of as to the speed of the train made from ten to thirty minutes after the accident is not competent as part of the *res gestæ*. "His declaration, after the accident had become a completed fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ*, — simply an assertion or representation, in the course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had been fully exerted. It is not to be deemed part of the *res gestæ*, simply because of the brief period intervening between the accident and the making of the declaration. The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes — an appreciable period of time — after the accident, cannot, upon principle, make this case an exception to the general rule." *Vicksburg, &c. R. R. v. O'Brien*, 119 U. S. 99 (1886).

Statements by an injured person to his physician describing the accident, a sufficient time having elapsed to carry the injured man home and to summon the doctor, are not admissible as part of the *res gestæ*. *Merkle v. Bennington*, 58 Mich. 156 (1885).

An account by an injured man to his wife, fifteen or twenty minutes after the accident, is not admissible. "They were no part of the transaction that was being tried." *Estell v. State*, 51 N. J. L. 182 (1889). So of a narrative by a husband to his wife made from thirty to sixty minutes after the occurrence in question. *Arnil v. Chicago, &c. R'y Co.*, 70 Ia. 130 (1886). "The *res gestæ* or transaction was the accident, and how it occurred. It is not essential that the declaration sought to be introduced in evidence was uttered at the identical time the accident occurred, but, if made soon afterwards, and explanatory thereof, it is admissible." *Arnil, Adm'x, v. Chicago, &c. R'y Co.*, 70 Ia. 130 (1886).

Mere nearness in point of time has not sufficed to admit statements as part of a *res gestæ* fact, even in courts which favor a liberal interpretation of the rule, where the utterance does not seem to have been instinctive. Thus, in an indictment of assault with intent to murder, the remarks of the assailant while lying wounded on the ground shortly after the termination of the assault, are not competent in his own favor. "Were the statements of defendant to Haselfield spontaneous, instinctive, generated by excited feeling? We think not. When asked to tell about the matter he does not do it, seems to be thinking more about catching his horse than anything else, and only agrees or promises to tell witness if he will first catch his horse and fetch it to him; and he does not tell him until he has done so, and that, too, after the lapse of about three minutes. This looks very much like a 'break or let down' in the continuity of the transaction. In his apparently cool condition and freedom from excitement, the three minutes' time might have afforded defendant ample opportunity to concoct the statement which was afterwards made to the witness. We are of opinion the court did not err in holding that the declarations were self serving, and consequently inadmissible." *Bradberry v. State*, 22 Texas App. 273 (1886).

Where the conductor of a horse-car said to a passenger immediately upon the happening of the accident that it was his fault, the fact is not competent as part of the *res gestæ*. The court adopt the language of an earlier decision (*Lane v. Bryant*, 9 Gray, 245): "The declaration of the defendant's servant was incompetent, and should have been rejected. It was made after the accident occurred, and the injury to the plaintiff's carriage had been done. It did not accompany the principal act, . . . or tend in any way to elucidate it. It was only the expression of an opinion about a past occurrence, and not part of the *res gestæ*. It is no more competent because made immediately after the accident than if made a week or a month

afterwards." *Williamson v. Cambridge R. R.*, 144 Mass. 148 (1887); *Tyler v. Old Colony R. R.*, 157 Mass. 336 (1892).

What the plaintiff in an action for injuries from falling or being pushed into a ditch by the defendant's negligence said upon being pulled out of the ditch is mere hearsay. "Although occurring immediately after the accident, it was no part of the *res gestæ*, but a narration of a past transaction, and therefore mere hearsay evidence." *Cleveland, &c. R. R. v. Mara*, 26 Oh. St. 185 (1875).

(2) In *Hoover v. Cary*, 86 Ia. 494 (1892), declarations were rejected as part of the *res gestæ* because not made at such a time "as to reasonably exclude the idea of deliberate design."

MUST CHARACTERIZE THE PRINCIPAL FACT. — As has been abundantly seen in the foregoing cases, it is essential in order to be in any just sense part of a *res gestæ* fact that the declaration in question should so limit, explain, or characterize such *res gestæ* fact as to be necessary in order to its full understanding.

"In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the verbal fact would not infrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context." *Insurance Company v. Mosley*, 8 Wall. 397 (1869). "It becomes a part of the act itself, is explanatory of it, and gives it, to a great extent, its character." *Mack v. State*, 48 Wis. 271, 280 (1879). In a Connecticut case the court say that declarations part of a *res gestæ* fact "must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain, and to so harmonize with them as to constitute a single transaction." *Rockwell v. Taylor*, 41 Conn. 55 (1874). "The limitations upon that rule are easily stated, but often difficult in their application. The declarations must be made at the time of the act done which they are supposed to characterize; they must be calculated to unfold the nature and quality of the facts which they are intended to explain, and they must so harmonize with these facts as to form one transaction." *Smith v. N. B. Society*, 123 N. Y. 85 (1890). "The difficulty of formulating any exact rule by which the admissibility of such declarations as a part of the *res gestæ* shall be determined has been a source of frequent perplexity to the courts, and a cause of common lamentation to the judges and the text-writers. The inherent difficulty of the subject, and the necessity of referring each case to its own particular circumstances, are universally recognized. The declarations in question must not be mere

narratives of a past occurrence, but must have been made at the time of the act done which they are supposed to characterize; and they must be well calculated to unfold the nature and quality of the facts which they are offered to explain, and must so harmonize with them as obviously to constitute one transaction. But, while such declarations must be made at the time of the act done, that rule is not pressed to the extent that they must be precisely concurrent in point of time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at the time or so near to it as reasonably to preclude the idea of deliberate design, and they be not a narrative of a past occurrence, they are then to be regarded as contemporaneous." *Archer v. Helm*, 70 Miss. 874, 890 (1893).

In an action against a carrier for assaulting the plaintiff, whose ticket did not permit him to use the part of the boat where he was found, the plaintiff is entitled to put in evidence the declarations of the defendant's servants while engaged in violently removing him. "We are of opinion that these declarations constituted a part of the *res gestæ*. They were made by one servant of the defendant while assisting another servant in enforcing its regulation as to deck passengers. They were made when the watchman and the mate, according to the evidence of the plaintiff, were both in the very act of violently 'pushing him,' while in a helpless condition, to that part of the boat assigned to deck passengers. Plainly, therefore, they had some relation to the inquiry, whether the enforcement of that regulation was attended with unnecessary or cruel severity. They accompanied and explained the acts of the defendant's servants out of which directly arose the injuries inflicted upon the plaintiff." *Steamboat Co. v. Brockett*, 121 U. S. 637, 649 (1886).

DISCRETION. — Frequent statements appear in the foregoing decisions to the effect that the admissibility of declarations as part of the *res gestæ* depends upon the discretion of the court. Many such expressions appear unduly sweeping. The discretion of the court in admitting such declarations is no greater than in other cases where relevant testimony is offered. Whether the evidence is of sufficient probative force to warrant its admission; whether it is too remote to be of value; whether it is dangerous, as tending to mislead the jury, — these and similar questions are determined by the sound discretion of the court, subject to control by the upper court in case of abuse. But the presiding justice has no discretion to modify the rules of evidence in the case of declarations part of the *res gestæ* in a different sense than in other cases where nice questions of degree arise. "It is not a matter of discretion with the presiding judge, to determine whether or not the declarations are admissible. That is determinable by well settled principles of law, which must be applied to each case as it arises; the restriction being

that the declaration must be contemporary with the principal transaction, and derive some degree of credit from it." *Equitable, &c. Ass. v. McCluskey*, 1 Col. App. 473 (1892).

STATEMENTS BY AGENTS, CO-CONSPIRATORS &C. — With all due deference to Professor Greenleaf, who is followed by the learned author, the attempt to introduce the declarations of agents, fellow-conspirators, &c., as instances of the *res gestæ* rule, merely brings an element of further ambiguity into the consideration of a subject which is at best considerably befogged. Under certain circumstances, fixed by positive law, the acts and declarations of B. are considered as being those of A. This has nothing to do with the law of evidence. It is part of the law of agency, privity, conspiracy, &c. When it is ascertained by the rules of these branches of the substantive law, that the proper circumstances exist to enable B. to act or speak for A., the law of evidence applies precisely the same rule in receiving the declarations of B. that it would have applied to those of A. Clearly, therefore, the question is not one of evidence. The convenient obscurity of the phrase "*res gestæ*" operates at this point. The substantive law decides that B., as a partner or other agent, can bind A. by his acts or declarations, when he is engaged on the *business* of his principal. B., as a conspirator, can, by the rules of positive law, bind his fellow-conspirator, A., by his acts or omissions only when engaged in furthering the *business* agreed on by the conspiracy. This word "*business*," by being turned into the phrase "*res gestæ*," may readily become confused with the same phrase "*res gestæ*" where it means the facts in issue and certain relevant facts in a particular case. So far as the law of evidence is concerned, the use of the phrase in any other than the latter sense is greatly to be deplored.

The extent to which the confusing of these two possible meanings of the phrase "*res gestæ*" is carried is shown in a late case in the supreme court of Texas, where the statements of physicians made while attending a sick man and diagnosing his case were held admissible as part of the *res gestæ*. "The opinions expressed at the time with reference to the subject of consideration by one or the other in the course of their examination were, in our opinion, in the nature of *res gestæ*, and so admissible. The declarations were made in the course of their business and while engaged in a professional duty. They were coincident business declarations." *Mut. Life Ins. Co. v. Tillman*, 84 Tex. 31 (1892).

Hearsay. — The rule excluding the reported statements of parties not called as witnesses is unquestionably an essential characteristic of the English law of evidence. Like many other characteristic features of this law, its original reason for existence is probably to be sought in fear lest that juries might be induced to give a

reported statement undue probative force. As a matter of logic, that a person not present in court has stated a certain fact to be true is probably of but slight probative force as proof of the fact. A tribunal of intellectual poise might, however, safely be permitted to receive such a statement, giving it proper weight. Instances frequently occur where the operation of the hearsay rule is to remove from the consideration of court and jury evidence which would be helpful to a correct conclusion. But practical considerations have firmly established the rule that the existence of facts must be proved by the statements of persons called as witnesses or by documents properly verified to the tribunal. *Fougue v. Burgess*, 71 Mo. 389 (1880); *Sherwood v. Houston*, 41 Miss. 59 (1866); *Forrester v. State*, 46 Md. 154 (1876); *Spencer v. Fortescue*, 112 N. C. 268 (1893); *Atchison, &c. R. R. v. Parker*, 5 C. C. A. 220 (1893); *Marks v. Sullivan*, 9 Utah, 12 (1893); *Myers v. Knabe*, 51 Kans. 720 (1893); *Salem Gravel Road Co. v. Pennington*, 62 Ind. 175 (1878); *Anderson v. Fetzer*, 75 Wisc. 562 (1890); *Scales v. Desha*, 16 Ala. 308 (1849); *Page v. Parker*, 40 N. H. 47 (1860); *Kent v. Mason*, 79 Ill. 540 (1875); *Bornheimer v. Baldwin*, 42 Cal. 27 (1871); *Shaw v. Susquehanna Boom Co.*, 125 Pa. St. 324 (1889); *Village of Ponca v. Crawford*, 18 Neb. 551 (1886); *Befay v. Wheeler*, 84 Wis. 135 (1893); *Little v. Cook*, 55 Minn. 265 (1893); *Brown v. Prude*, 97 Ala. 639 (1893); *Illinois Central R. R. v. Langdon*, 71 Miss. 146 (1893); *Downtain v. Connellee*, 2 Tex. Civ. App. 95 (1893); *Baker v. Goldsmith*, 91 Ga. 173 (1892). What a witness "understood from some source" is properly rejected as hearsay. *Scales v. Desha*, 16 Ala. 308 (1849); "That it was a matter of common report and public notoriety that intoxicating liquors were sold at" a certain drug store is hearsay and inadmissible. *Cobleigh v. McBride*, 45 Ia. 116 (1876). The error of admitting hearsay is not cured by an instruction to disregard it. *Demoney v. Walker*, 1 N. J. Law, 33 (1790).

Its admission is none the less subject to objection and exception where the questions bringing it out are asked by the judge. *Bornheimer v. Baldwin*, 42 Cal. 27 (1871). The fact that the reported statement is that of an expert's opinion does not affect the application of the rule. *Village of Ponca v. Crawford*, 18 Neb. 551 (1886).

Among the objections to hearsay must be included the infirmity which arises from the fact that the person on whose credit the probative statement really rests cannot be subjected to the tests of cross examination. "A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches himself in the simple assertion that he was told so, and leaves the burden entirely upon his dead or absent author." *Coleman v. Southwick*, 9 Johns. 45 (1812).

The rule applies equally where probative statement of the person not called as a witness is in writing, as, for example, a letter. *Brooks v. Acton*, 117 Mass. 204 (1875); *Anderson v. Fetzner*, 75 Wis. 562 (1890); *Pearson v. Darrington*, 32 Ala. 227, 250 (1858). Or is contained in a deposition. *Page v. Parker*, 40 N. H. 47, 60 (1860).

The United States supreme court in an early case apparently received hearsay as evidence of death seemingly on the ground of a difficulty in getting better evidence. *Lessee of Scott v. Ratliffe*, 5 Peters, 81, 86 (1831); *Jackson v. Boneham*, 15 Johns. 226 (1818).

The question has been raised whether a witness in stating his own age is testifying to hearsay. That he is not, see *Cheever v. Congdon*, 34 Mich. 296 (1876); *Morrell v. Morgan*, 65 Cal. 575 (1884); *State v. Cain*, 9 W. Va. 559 (1876); *State v. McClain*, 49 Kans. 730 (1892); *Rogers v. De Bardeleben Coal &c. Co.*, 97 Ala. 154 (1892). "It is quite clear that one may testify from his own knowledge of himself whether he was twenty-one or sixteen years of age at a certain time" — to be given such weight as the jury please. *Hill v. Elridge*, 126 Mass. 234 (1879) "The witness knows the age of her sister from the declarations of her mother, who is deceased. Now, that this species of evidence must be admitted has always been held, for otherwise a person could not prove his own age; for where no family record is made, he can only show it from the declaration of his parents or others cognisant of the fact. Such testimony has always been received, unless there was better evidence in the power of the party. The general rule undoubtedly is, that the best evidence which the nature of the case admits must be produced. But this rule is relaxed in cases of pedigree." *Watson v. Brewster*, 1 Pa. St. 381 (1845).

But the declarations of a testator are not admissible as to his age. It is "a fact of which he could not have any personal knowledge." *Doe v. Ford*, 3 Q. B. U. C. 352 (1847).

So a young girl may testify as to her parentage. "It is certainly competent for one who, from his earliest recollection, has been a member of one's family, given his name, and reared in the belief, and in all ways given to understand that he is a son in the household to testify of his parentage . . . to so rear a child is in the nature of an admission of parentage, and should be so regarded." *Comstock v. State*, 14 Neb. 205 (1883).

On the other hand, a person cannot testify as to an injury suffered at the age of four. *Grangers' Ins. Co. v. Brown*, 57 Miss. 308 (1879). A present impression produced by information from others is still hearsay, *Lamar v. Pearre*, 90 Ga. 377 (1892).

A man cannot refresh his memory from memoranda made from the reports of servants. *Tingley v. Fairhaven Land Co.*, 9 Utah, 34 (1894). Or testify as to what he has learned from a record made by another person. *Cleveland, &c. R. R. Co. v. Brown*, 53 Ill. App. 227 (1893).

BEST EVIDENCE RULE. — An attempt has been made to regard the rule against hearsay as an application of the best evidence rule and permit its reception "when no evidence can be supposed to exist." *Gould v. Smith*, 35 Me. 513 (1853). "The cases in which hearsay, declarations of parties, and reputation, have been allowed in evidence, are where no better evidence can be supposed to exist." *Crouch v. Eveleth*, 15 Mass. 304 (1818); *Mima Queen v. Hepburn*, 7 Cranch, 290 (1813); *Hopt v. Utah*, 110 U. S. 574 (1883). "Hearsay is uniformly holden incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who can speak from their own knowledge." *Page v. Parker*, 40 N. H. 47, 60 (1860). "Such testimony is excluded whenever it appears that a higher degree of evidence of that fact can be obtained by the production of the person from whom the evidence offered was derived; but whenever the testimony of such person is of no higher degree in establishing the fact to be shown than the evidence offered, either is original and primary evidence of that fact." *Smith v. Whittier*, 95 Cal. 279, 293 (1892).

It is certainly to be modified to the extent stated by Chief Justice Marshall in *Mima Queen v. Hepburn*, 7 Cranch, 290 (1813); — "That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." *Ibid.*

It is probably upon the principle of its being the best evidence available that the recognized exception to the hearsay rule obtains "that declarations, written or oral, made by a testator after the execution of his will, are, in the event of its loss, admissible, not only to prove that it has not been cancelled, but also as secondary evidence of its contents." *Matter of Page*, 118 Ill. 576 (1886).

But it is further true that where no better evidence can possibly be secured hearsay is not competent. For example, the statements of a deceased person, not part of the *res gestæ*, and not made as a witness on a former trial, are not admissible to prove an account. *Salem Gravel Road Co. v. Pennington*, 62 Ind. 175 (1878). So the fact that a witness is dead or has left the country is no reason for admitting his declarations, either written or spoken. *Pearson v. Darrington*, 32 Ala. 227, 250 (1858).

HEARSAY TO THE COURT. — The nature of the danger apprehended to the administration of justice from the use of hearsay in misleading the jury is emphasized by the fact that, where the question is one of fact preliminary to the admission, and therefore to be decided by the court, the rule excluding hearsay does not apply. For example, the court in deciding whether proper search for the original

document has taken place sufficient to let in secondary evidence of contents, may rely upon hearsay. *Bridges v. Hyatt*, 2 Abb. Prac. 449 (1856).

BOOKS OF STANDARD AUTHORITY. — A statement is none the less hearsay because it is contained as a scientific statement in a standard work on medicine. *Brown v. Sheppard*, 13 Q. B. U. C. 178 (1856); *Fox v. Peninsular, &c. Works*, 84 Mich. 676, 681 (1891); *Bloomington v. Shrock*, 110 Ill. 219 (1884); *Tucker v. Donald*, 60 Miss. 460 (1882); *Com. v. Marzynski*, 149 Mass. 68 (1889); *Gallagher v. Market St. R. R.*, 67 Cal. 13 (1885); *Kreuziger v. Chicago, &c. R. R.*, 73 Wis. 158 (1888); *Com. v. Sturtivant*, 117 Mass. 122 (1875). The rule cannot be evaded by reading from the book to an expert medical witness, and asking him whether it is the truth. *Marshall v. Brown*, 50 Mich. 148 (1883); *Davis v. State*, 38 Md. 15 (1873).

The rule refusing to admit works of standard authority is not modified by the fact that counsel declined to examine an expert further entirely on the expectation that he could offer the book itself later, nor that the expert had read passages on his cross-examination. *State v. O'Brien*, 7 R. I. 336 (1862).

So of the United States Medical Dispensary. *Boehringer v. Richards Medicine Co. (Tex.)*, 29 S. W. 508 (1894).

Such statements cannot be shown even for the purpose of corroborating an expert by showing that he is sustained by medical authority. *Fox v. Peninsular, &c. Works*, 84 Mich. 676 (1891); *Huffman v. Click*, 77 N. C. 55 (1877).

But where an adverse expert witness bases his opinion upon the authority of a particular author, that work may be read in evidence to contradict him. "Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories, would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory." *Bloomington v. Schrock*, 110 Ill. 219 (1884).

It would seem that, upon principle, a statement in a book of standard authority should be competent where the fact to be proved is not the truth of the statement, but the existence of the statement. In a case like *Brown v. Piper*, where originality was claimed for a

certain invention, it would seem to be competent to show that the essential principle of the alleged invention was described in the American Encyclopædia. *Brown v. Piper*, 91 U. S. 37 (1875).

The error in admitting the statements of medical works may be cured by the other side going into the same kind of evidence without objection. *Kreuziger v. Chicago, &c. R. R.*, 73 Wis. 158 (1888).

MORTALITY TABLES.—On the other hand, mortality tables of recognized authority are admissible to assist the jury in estimating decreased earning capacity, &c., caused by a personal injury. "In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury." *Vicksburg, &c. R. R. v. Putnam*, 118 U. S. 545 (1886). "The expectancy of life is ascertained by the average mortality of large numbers, and for convenience these averages are gathered into tables. There are several such tables, English and American, and any of them shown to be used by reputable insurance companies, with such other proof as the parties may offer, either as to the condition of the individual or the general mortality of the community, would be admissible." *Mississippi, &c. R. R. v. Ayres*, 16 Lea, 725 (1886); *McKeigue v. Janesville*, 68 Wis. 50 (1887). But the mortality or annuity tables must be shown to be correct; and it is error to introduce in evidence the table of the expectation of the years of life contained in a book entitled "A Million of Facts; Conkling's Handy Manual of Useful Information and Atlas of the World; all for Twenty-five Cents," without more evidence, or that it was of any "higher character than any cheap book sold on railways." *Galveston, &c. R. R. v. Arispe*, 81 Tex. 517 (1891).

SCOPE OF THE RULE.—The rule as stated above is not equivalent to saying that the statements of persons not called as witnesses are not admissible. They are not admissible as evidence of the existence of the facts which they purport to state. But the fact that a certain statement has been made may itself be relevant, whether it states the truth or not. In fact the truth of the statement is not what is relevant. It is the statement itself.

The hearsay rule accordingly does not apply to proof of an oral contract by a bystander. "It was not hearsay, but legal proof of a contract of which there was no other or better evidence. It was evidence of a fact, and not of a mere conversation or declaration." *Blanchard v. Child*, 7 Gray 155 (1856). A by-stander can testify to such a conversation, even if carried on through an interpreter, though he only understands one language, and relies on the interpreter for the other. *Com. v. Vose*, 157 Mass. 393 (1892).

In the same way the fact that a certain statement has been made out of court may be admissible to fix a date or identify an interview. *Hill v. North*, 34 Vt. 604 (1861). Or to fix the time at which a witness' attention was called to a fact. *Barrow v. State*, 80 Ga. 191 (1887).

A declaration may be used as a fact to identify an interview. The hearsay rule has no application to such a use. "Any circumstance or act occurring at that transaction and remembered by both witnesses would show that they were testifying to the same occasion, and would be clearly competent. So we are of opinion that the conversation of the parties or any declarations made at the time are to be regarded as in the nature of verbal acts, and admissible for the purpose of identifying the occasion of which the witnesses speak. Statements used for this limited purpose are admitted without regard to the truth of the fact stated." *Earle v. Earle*, 11 All. 1 (1865).

Giving notice may be "considered an act, which he might prove in any case in which it became material." *Kilburn v. Bennett*, 3 Mete. 199 (1841).

EXCLAMATIONS OF PAIN, &c.—Where the existence of any bodily or mental state is a fact in issue or relevant to the issue the usual verbal expressions attending the existence of such state are competent original evidence of the fact of its existence. Such statements are not an exception to the hearsay rule. It is the existence of the statement rather than its purport which is considered relevant.

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence." *Insurance Co. v. Mosley*, 8 Wall. 397 (1869); *Texas, &c. R. R. v. Barron*, 78 Tex. 421 (1890); *McKeigue v. Janesville*, 68 Wis. 50 (1887); *Phillips v. Kelly*, 29 Ala. 628 (1857); *Sanders v. Reister*, 1 Dak. 151 (1875); *Frink v. Coe*, 4 Greene (Ia.) 555 (1854); *Hagenlocher v. Coney Island, &c. R. R.*, 99 N. Y. 136 (1885); *Western Union Tel. Co. v. Henderson*, 89 Ala. 510 (1889); *Helton v. Alabama &c. R. R.*, 97 Ala. 275 (1893); *People v. Meservey*, 76 Mich. 223 (1889); *Lush v. McDaniel*, 13 Ired. L. 485 (1852); *Plummer v. Ossipee*, 59 N. H. 55 (1879); *Texas, &c. R. R. v. Barron*, 78 Tex. 421 (1890); *Gray v. McLaughlin*, 26 Ia. 279 (1868); *Commissioners v. Leggett*, 115 Ind. 544 (1888). "It is evident that the reason for the rule is a sound one, since it is clear that as many of the organs of the body cannot be seen, latent injuries can only be discovered and known through the declarations of the injured person."

Exclamations of pain are evidence of a then present condition when made to a physician who is not attending the declarant professionally, in the same way and to the same extent that they would be competent if made to a non-professional witness. *Drew*

v. Sutton, 55 Vt. 586 (1882). Apparently in *Newman v. Dodson*, 61 Tex. 91 (1884) it is regarded as immaterial whether the physician is employed or not. Such exclamations while under examination by a physician who is preparing himself to be a witness in the case are not competent. "It has all the evils of manufactured testimony, without any possible means of detecting the falsity of it." *Jones v. Portland*, 88 Mich. 598 (1891); *Stewart v. Everts*, 76 Wis. 35 (1890).

The name of the party inflicting the injury is to be excluded from such a statement. *Denton v. State*, 1 Swan, 279 (1851).

Thus in an action for personal injuries exclamations of pain uttered by deceased at the time of the injury and from that time down to her death are admissible. *McKeigue v. Janesville*, 68 Wis. 50 (1887).

The declarations of a sick person made from time to time concerning present sufferings and sensations are admissible to prove the fact of such sufferings and sensations. *Elliott v. Van Buren*, 33 Mich. 49 (1875); *Hall v. American Masonic &c. Ass'n.*, 86 Wis. 518 (1893).

"Evidence of exclamations which are natural concomitants and manifestations of pain and suffering are still admissible, because regarded as involuntary and natural expressions which a witness may describe for the same reason that he may the appearance of the party." *Kennedy v. R. C. & B. R. Co.*, 130 N. Y. 654 (1891); *Thomas v. Herrall*, 18 Oreg. 546 (1890).

On an action for a nuisance by the noxious smells from the defendant's out buildings, the plaintiff can give in evidence complaints by his wife since deceased. "It is difficult to perceive why the complaint of a person suffering from a nuisance, may not be received as an expression of bodily or mental feeling, and as original evidence, as well as in any other case of annoyance or injury." *Kearney v. Farrell*, 28 Conn. 317 (1859).

In an action against a town for injuries caused by a defect in the highway the presiding judge ruled that "groans or exclamations of pain, made by the plaintiff, at any time, were admissible in evidence, although they referred either by word or gesture to the locality of the pain; as if a man should put his hand upon his side and groan, or should say, 'Oh! my head!' or utter similar complaints, being an expression of present pain or agony; but that any statement of his condition or feelings, made in answer to a question, or as a narrative, or with a view to communicate information, was not admissible." This ruling was sustained by the supreme judicial court, as follows:—"The rule of law is now well settled, and it forms an exception to the general rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are consid-

ered competent and original evidence in his favor. And the rule is founded upon the consideration, that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. There are ills and pains of the body, which are proper subjects of proof in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady. Of course, it will always be for the jury to judge whether such expressions are real or feigned, which can be readily ascertained by the manner of them, and the circumstances under which they are proved to have been made." *Bacon v. Inhabitants of Charlton*, 7 Cush. 581 (1851).

STATEMENTS TO PHYSICIAN. — Analogous to statements of pain, &c., are the communications made to a doctor as the basis of medical treatment. *State v. Belcher*, 13 S. C. 459 (1880); *Collins v. Waters*, 54 Ill. 485 (1870); *State v. Gedicke*, 43 N. J. L. 86 (1881); *Rogers v. Crain*, 30 Tex. 284 (1867); *Barber v. Merriam*, 11 All. 322 (1865); *Fay v. Harlan*, 128 Mass. 244 (1880); *Matteson v. New York Central R. R.*, 62 Barb. 364 (1862); *Towle v. Blake*, 48 N. H. 92 (1868); *Earl v. Tupper*, 45 Vt. 275 (1873); *Wilson v. Granby*, 47 Conn. 59 (1879); *Lakeshore, &c. R. R. v. Rosenzweig*, 113 Pa. St. 519 (1886); *Perkins v. Concord R. R.*, 44 N. H. 223 (1862).

Such a statement cannot be so extended as to include a statement that a particular person caused the injury. *Morrissey v. Ingham*, 111 Mass. 63 (1872). Or symptoms at a previous period or the existence of disease at such earlier time. *Lush v. McDaniel*, 13 Ired. Law, 485 (1852). Nor can a physician testify as to what the patient says is the cause of the injury. "While a witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages, be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject matter of inquiry, and which may be proved by other evidence." *Roosa v. Boston Loan Co.*, 132 Mass. 439 (1882); *Illinois &c. R. R. v. Sutton*, 42 Ill. 438 (1867).

So a patient's declarations as to the instrument with which an

injury is inflicted is incompetent. *Collins v. Waters*, 54 Ill. 485 (1870).

A mere narrative to a doctor cannot be used as evidence of the fact stated any more than the same story when told to some one else. "It was a statement of a fact, and was used as evidence of that fact. It was therefore wrongly admitted." *Chapin v. Marlborough*, 9 Gray, 244 (1857). Probably the statement would have been competent as cross-examination of the doctor if made the basis of his opinion.

"Everything in the nature of a narrative of what is already past is to be carefully excluded, and the testimony confined to such expressions as furnish evidence of the present condition of the patient." *Taylor v. R. R.*, 48 N. H. 304 (1869).

If the statements, on the other hand, are not narrative of something that is past but "a description of his symptoms at the time it was made . . . it may be fairly inferred that it was made for the purpose of medical advice and treatment" and such statements are admissible if made a day or two before or even during the trial. *Fleming v. Springfield*, 154 Mass. 520 (1891).

Such declarations are limited to proof of the bodily or mental state. The declarant cannot go further and manufacture self-serving evidence by declaring the cause of the injury. "The rule of law is now well settled, and it forms an exception to the general rules of evidence, that where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration, that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. There are ills and pains of the body, which are proper subjects of proof in courts of justice, which can be shown in no other way. Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany, and furnish evidence of, a present existing pain or malady. Of course, it will always be for the jury to judge whether such expressions are real or feigned, which can be readily ascertained by the manner of them, and the circumstances under which they are proved to have been made." *Bacon v. Inhabitants of Charlton*, 7 Cush. 581 (1851).

This was approved in *Chapin v. Marlborough*, 9 Gray, 244 (1857).

COMPARED WITH RES GESTÆ. — A very natural tendency, however, exists, wherever proof of the physical and mental state in

question is contemporaneous with some relevant act to treat the proof as admitted as a declaration part of the *res gestæ*.

For example, the intention with which an alleged bankrupt left his home being expressed in his declarations, proof of the statements has been treated as part of the *res gestæ* act of leaving. Intention is really a fact itself in the *res gestæ*, and its proof is admissible on ordinary principles. *Rawson v. Haigh*, 2 Bing. 99, 104 (1824); *Ridley v. Gyde*, 9 Bing. 349 (1832).

So, in an aggravated assault by a school-teacher on a pupil, the plaintiff cannot show that the scholar said to his father two or three nights after the assault that his hips pained him so he could not sleep. The reason assigned is that "the statements were made too long after the infliction of the injury," and the rule is stated in the language of the *res gestæ* rule that the declarations must be instinctive. *Dowlen v. State*, 14 Tex. App. 61 (1883).

It is thought that the correct rule is that announced by the supreme court of Iowa in a case of injury from a defective highway. "A witness was asked to state what complaint of pain or disease plaintiff made about a week after the accident. It is now insisted that, as plaintiff's complaints 'were no part of the *res gestæ*, they were not admissible. They were not admitted on that ground, but for the reason that his complaints of pain or disease were competent to show the condition of his health, which was in issue under his claim that he was severely and permanently injured." *Blair v. Madison Co.*, 81 Ia. 313 (1890).

Any attempt to assign a cause for the injury, and any narrative of "how it happened" are incompetent. *Commissioners v. Leggett*, 115 Ind. 544 (1888).

SANITY.—Where the issue involves the fact of sanity, many declarations, oral or written, of the party whose mental state is involved may be given in evidence, not for the purpose of proving the truth of the declarations (which would be objectionable as hearsay), but as circumstantial evidence of the existence of a state of mind of which they are indicia or natural expression.

Thus, on an issue of the sanity of a testatrix, of her declarations showing a belief in spiritual communications, in her power to heal the sick, and "various other imaginations, delusions in one way and another." "The rule allowing the introduction of the declarations of a testator to show the condition of his mind is very general, and admits much that would be excluded if offered as testimony to prove facts. The rule allows great liberality to both parties as to the kind of evidence, and as to the length of time over which it extends. Much is necessarily left to the discretion of the presiding judge, and it is impossible to lay down any general rules which would cover all cases. To enable the jury to determine the real state of mind, the action of that mind, as shown best by conversations, declarations,

claims, and acts, is the most satisfactory evidence. But, in order to fairly judge, the examination must not be confined to a single declaration or conversation, but must embrace sometimes many years and many different acts and declarations, and sometimes, perhaps, the evidence may, at first view, be remote, and far from a demonstration." *Robinson v. Adams*, 62 Me. 369, 413 (1870).

Letters written by a testatrix are admissible on the question of her mental capacity. *Bulger v. Ross*, 98 Ala. 267 (1893).

FRAUD OR UNDUE INFLUENCE. — So, where the question is as to whether a testatrix was induced to execute a will by fraud, a fixed intention, both before and after its execution, to make a different disposition of her property is relevant, and such intention may be shown by the declarations of the testatrix, within certain limits fixed by the discretion of the court. "The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it. If therefore the statement or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissible. Its weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker as to be wholly immaterial, and wisely to be rejected by the judge.

Upon the question of capacity to make a will, evidence of this description is constantly received; and when the issue is one of fraud and undue influence it is equally material. "The requisite mental qualification to make a will might exist, and be entirely consistent with such a degree of weakness, or such peculiarity, as would make the party the easy victim of fraud and improper influence." *Shailer v. Bumstead*, 99 Mass. 112, 120 (1868); *Thompson v. Ish*, 99 Mo. 160 (1891); *Gardner v. Frieze*, 16 R. I. 640 (1891); *Linch v. Linch*, 1 Lea, 526 (1878). Declarations of intention to benefit certain persons do not, alone, furnish evidence which, as a matter of law, would justify a jury in setting aside a will on the

ground of testamentary incapacity. *Cawthorn v. Haynes*, 24 Mo. 236 (1857).

"Such declarations, alone, are not competent evidence to prove acts of others amounting to undue influence, although when the acts are proven, the declarations of the testator may be given in evidence to show the operation they had upon his mind." *Cudney v. Cudney*, 68 N. Y. 148 (1877).

The admissibility of these declarations is not confined to those made prior to or at the time of the execution of the will. It extends to subsequent declarations. As the court say in *Shailer v. Bumstead*, 99 Mass. 112, 120 (1868), "This evidence was not competent as a declaration or narrative to show the fact of fraud or undue influence at a previous period. But it was admissible not only to show retention or loss of memory, tenacity or vacillation of purpose existing at the date of the will, but also in proof of long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections or prejudices, or other intrinsic or enduring peculiarities of mind, inconsistent with the dispositions made in the instrument attempted to be set up as the formal and deliberate expression of the testatrix's will; as well as to rebut any inference arising from the non-revocation of the instrument. They were not rejected as too remote in point of time, or as having no tendency in their character to sustain the fact claimed to exist." *Ibid.*; *Waterman v. Whitney*, 11 N. Y. 157 (1854); *Mooney v. Olsen*, 22 Kan. 69 (1879).

So the declarations of a testatrix subsequent to the execution of the will are admissible to show imbecility of mind. *McTaggart v. Thompson*, 14 Pa. St. 149 (1850). Or, on the other hand, declarations of a testator to show his mental capacity for transacting business are competent. *Pinney's Will*, 27 Minn. 280 (1880).

"Parol evidence of the declarations of a testator expressing dissatisfaction with his will, and made shortly after its execution, such as 'I have done something I ought not to have done; I have made my will, and did not make it as I wanted to; I know I did wrong, but I could not help it. Lord God Almighty, who ever heard of such a will, but I can't change it,' is admissible, not to prove the fact that fraud was practiced upon him, or that undue influence was actually exercised, but as tending to show the state of testator's mind, and that he was in a condition to be easily influenced." *Dennis v. Weekes*, 51 Ga. 24 (1874); *Herster v. Herster*, 116 Pa. St. 612 (1887).

On the other hand, the view has been entertained that the declarations of a testator tending to show undue influence were admitted as part of the *res gestæ*, and therefore must be made contemporaneously with the execution of the will itself. *Comstock v. Hadlyme*, 8 Conn. 254 (1830).

This has been established as the rule in New York in cases

“where the validity of a will is disputed on the ground of fraud, duress, mistake, or some similar cause, aside from the mental weakness of the testator.” *Waterman v. Whitney*, 11 N. Y. 157 (1854).

A ruling to the effect that such declarations must be competent as part of the *res gestæ* was reversed in *Linch v. Linch*, 1 Lea, 526 (1878).

OTHER MENTAL STATES. — So where the question is as to the unfriendliness of one woman to another, her declarations to third parties on the subject are competent. “Whenever the mental feelings of an individual are to be proved, the usual expressions of such feelings are original evidence, and often the only proof of them which can be had.” *Jacobs v. Whitcomb*, 10 Cush. 255 (1852); *Casat v. State*, 40 Ark. 511 (1883); *State v. Hargrave*, 97 N. C. 457 (1887). “A man’s words show his mental condition. It is common to prove insanity by the party’s sayings as well as by his acts. One’s likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances. So that it is generally true that whenever a party’s state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath, but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence.” *Mooney v. Olsen*, 22 Kansas, 69, 77 (1879). So the *affection* of a husband for his wife may be shown by his letters to third persons. *Gaines v. Relf*, 12 How. 472 (1851). “Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct.” *Shailer v. Bumstead*, 99 Mass. 112 (1868).

So where the question of *intention* is involved, declarations stating the intention, either oral or in writing, are competent. So held where letters declaring an intention to leave a certain place were admitted as evidence of the existence of the intention. The letters being offered as entries in the course of business were first rejected, the court very carefully taking the distinction, frequently overlooked, between the letters as evidence of intention and as part of the *res gestæ*. “A man’s state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sound or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But whenever the

intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be." *Mut. Life Ins. Co. v. Hillmon*, 145 U. S. 285 (1891); *Hunter v. State*, 40 N. J. Law, 495 (1878). These declarations should be made, to be admissible, at a time when there was no motive to misrepresent. *Mut. Life Ins. Co. v. Hillmon*, 145 U. S. 285 (1891); *Hunter v. State*, 40 N. J. Law, 495 (1878).

So where the question is as to a servant's reason for abandoning an employment, his declarations as to the reason are competent. "The testimony is admitted on the presumption, arising from experience, that when a man does an act, his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting such intention." *Hadley v. Carter*, 8 N. H. 40 (1835); *Elmer v. Fessenden*, 151 Mass. 359 (1890). "We cannot follow the ruling at *nisi prius* in *Tilk v. Parsons*, 2 C. & P. 201, that the testimony of the persons concerned is the only evidence to prove their motives. We rather agree with Mr. Starkie that such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons." *Stark. Ev.* (10th Am. ed.) 89. As a rule such declarations are not evidence of the past facts which they may recite. The cases in which they have been admitted to prove the cause of a wound or injury, when the declarations were made at the time, or immediately after the event, if not exceptions to the general rule, at least mark the limit of admissibility. *Com. v. Hackett*, 2 All. 136, 140. *Com. v. M'Pike*, 3 Cush. 181, 184. *Insurance Co. v. Mosley*, 8 Wall. 397. The excluded testimony was not competent to prove that the defendant did tell the workmen the story. As to that, it was mere hearsay, and was not within the scope of the special reasons which led to the decisions last cited." *Elmer v. Fessenden*, 151 Mass. 359 (1890). A conversation showing a present intention to purchase certain premises is competent evidence that the plaintiff's efforts were not the cause of the trade. *Folks v. Burnett*, 47 Mo. App. 564 (1891).

So the intention of taking a train on the part of a man injured by a locomotive may be shown by his declarations. The court apparently rely upon an unnecessary reference to the rule as to declarations part of the *res gestæ*. *Railway Co. v. Herrick*, 49 Oh. St. 25 (1892). So an intention of making a permanent or temporary change of residence may be shown by the declarations of the person himself. *Gorham v. Canton*, 5 Greenl. 266 (1828); *Kilburn v. Bennett*, 3 Metc. 199 (1841). So on an action for negotiating a sale of property,

prior declarations by a purchaser showing a previously formed intention of buying the property are competent. *Folks v. Burnett*, 47 Mo. App. 564 (1891). The purpose for which a man is walking being important, his statement that he is going "to look for it" is competent. *U. S. v. Nardello*, 4 Mack. 503 (1886).

When it is said that such statements are admissible as part of the *res gestæ*, what is (or should be) meant is that the intention is a fact in the *res gestæ* of that particular case. As most of these declarations of intention are contemporaneous with some relevant act, the tendency to confuse the rule of proving a mental state by its usual verbal expression and the rule admitting declarations as part of the *res gestæ* has proved a strong one. See *Gorham v. Canton*, 5 Greenleaf, 266 (1828); *Kilburn v. Bennett*, 3 Metc. 199 (1841).

KNOWLEDGE. — Where the relevant mental state is that of knowledge of certain facts, a statement showing knowledge of these facts is admissible, not as evidence that the facts are true, but as evidence of the existence of the knowledge. *Rodriguez v. Espinosa*, 25 S. W. 669 (1894); *Cadden v. American Steel Barge Co.*, 88 Wis. 409 (1894); *Chattanooga R. R. Co. v. Clowdis*, 90 Ga. 258 (1892).

In a suit for infringement of a patent, on a question of when the plaintiff made his invention, his declarations to third parties at a certain time describing his invention are competent evidence. "In many cases of inventions, it is hardly possible in any other manner to ascertain the precise time and exact origin of the particular invention. The invention itself is an intellectual process or operation; and, like all other expressions of thought, can in many cases scarcely be made known, except by speech." *Philadelphia, &c. R. R. v. Stimpson*, 14 Peters, 448, 462 (1840).

So on the question of admitting dying declarations, statements by third parties to declarant are admissible as evidence of his knowledge of his condition. *Com. v. Roberts*, 108 Mass. 296 (1871).

Where it is claimed that negligence arises from failure to meet certain known requirements, notice of these requirements is a material fact and if conveyed in an oral statement, such statement may be proved either by admission of the party or by any one who heard it given. This is not under the hearsay rule. "If the fact sought to be established, is that certain words were spoken, without reference to the truth or falsity of the words, as, for instance, that a certain statement was made as a party to the action is an admission of a fact, or was made to him as a notice, or under such circumstances as to require action or reply from him, the testimony of any person who heard the statement is original evidence, and not hearsay." *Smith v. Whittier*, 95 Cal. 279, 293 (1892).

Where the question is as to whether an assured knew that he had a certain disease at the time of his application, evidence of his state-

ments to third parties about that time is competent. *Swift v. Massachusetts, &c. Co.*, 63 N. Y. 186 (1875).

On a defence of insanity to an indictment for murder, the defendant is entitled to show that his wife made certain statements to him shortly before the killing to the effect that deceased had ravished her and stolen from the defendant, for the purpose of showing his mental state at the time of the killing. *People v. Wood*, 126 N. Y. 249 (1891).

Where the issue raised involves knowledge by a testatrix of the contents of her will, her declarations showing such knowledge or lack of it are competent. *Maxwell v. Hill*, 89 Tenn. 584 (1890). In an accident caused by a blind message by the train despatcher of a railroad to the conductor of a train, his understanding of the meaning of the despatch may be shown by his declarations made at the time of the collision. *McLeod v. Ginther*, 80 Ky. 399 (1882).

Acts of memory may be shown where the fact of being able to remember is a relevant fact. *Donnelly v. State*, 26 N. J. L. 463 (1857).

Reputation that a railroad track is in bad condition is admissible on the question of notice. *Missouri, &c. R.R. v. Johnson*, 72 Tex. 95 (1888).

AS BEARING ON MOTIVE, &c. — Where the question arises as to what was the thought in a person's mind at the time he acted the relevant statements brought home to his consciousness are competent. This is not under the application of the hearsay rule. It is the fact of the statement which is admissible, regardless of its truth or falsity. In other words, the statement is not admitted as evidence of what is stated, but as evidence that such a statement was made. If it was the basis of conduct, whether it should have been is generally immaterial.

So the existence of a rumor may be good circumstantial evidence. *State v. Jones*, 50 N. H. 369 (1871).

On an indictment for manslaughter, where the defence is that the killing was in necessary self-defence, threats by the deceased directed against the prisoners can be shown in evidence. *Sparks v. Com.*, 89 Ky. 644 (1890).

So where an injured person, subsequently deceased, accused during his last illness A. of the fatal shooting, the fact that deceased knew or believed that A. had threatened to kill him is admissible as showing a reason why the deceased might have inferred it was A. instead of actually seeing him. *Jones v. State*, 71 Ind. 66 (1880).

Threats of a deceased person not shown to have been communicated to the defendant are admissible on an indictment for murder to corroborate evidence of previous threats previously admitted, and also on the question who began the assault. *Levy v. State*, 28 Tex. App. 203 (1889); *Cox v. State*, 64 Ga. 374 (1879). Where a statement explains the cause of relevant conduct, it is competent. *People v. Hodgdon*, 55 Cal. 72 (1880).

On an indictment for felonious assault, the defence was that the cutting was done in self-defence. In support of this plea the defendant "sought to prove various facts, among them, that during the rencounter some one in the crowd was heard to say of the defendant: 'Kill him! kill him! don't let that nigger get back to the bottom. Kill him!'" The Court rejected the evidence as incompetent because the witness was not able to state who used the language. This ruling was erroneous. The rejected evidence was clearly competent as a part of the *res gestæ*, and as tending to show great hostility toward the defendant and the danger to which he was exposed." *Morton v. State*, 91 Tenn. 437 (1892).

Under certain circumstances, the existence of a rumor may be good circumstantial evidence. *State v. Jones*, 50 N. H. 369 (1871). Where a person claims to have acted on certain statements, one who heard them may testify as to them. *Badger v. Story*, 16 N. H. 168 (1844).

Where the question was as to the motive with which an alleged libel was published, the statements relating to the subject-matter made to the defendant are admissible as original evidence. "It happens in many cases that the very fact in controversy is, whether the words of a third person, not under oath, were written or spoken, and not whether they were true, and in other cases, such language or statements, whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy. In such cases . . . it is obvious the words or writings are not within the meaning of hearsay, but are original and independent facts, admissible in proof of the issue." *Jones v. Townsend*, 21 Fla. 431, 448 (1885). So where a vendor was sued for fraud in the sale of lands which he had never seen, evidence is competent of declarations to him by his grantor to the same effect. *Merwin v. Arbuckle*, 81 Ill. 501 (1876).

So on a question with what motive A. purchased a pistol, the fact that A.'s sister informed him of certain facts which would make such a purchase reasonable, is competent, whether the information were true or false. *People v. Shea*, 8 Cal. 538 (1857).

So where the defence of provocation by the speaking of words is relied upon as a defence in an action for assault and battery, the making of the statement is a fact which may be testified to by one who heard it, and if the party who heard it has forgotten, but testifies he reported it correctly, the party to whom it was reported can testify to it. *Green v. Cawthorn*, 4 Dev. L. 409 (1834). In general, where the motive of a party in doing an act is involved, it is competent to show that he was induced to do the act by what he had learned from third persons. *Carter v. Beale*, 44 N. H. 408 (1862).

And, in general, when a party claims to have acted on certain

statements any one who heard may testify to them. *Badger v. Story*, 16 N. H. 168 (1844).

When the question was why the female plaintiff in a suit for breach of promise of marriage burned a certain letter, a witness may testify that she advised her doing so. *Tobin v. Shaw*, 45 Me. 331 (1858).

On an action for malicious prosecution, statements made to the defendant before instituting proceedings and incriminating the plaintiff are competent. *Bacon v. Towne*, 4 Cush. 217, 240 (1849). On the question of defendant's negligence in crossing certain railroad tracks, the statements of bystanders that the train (which actually struck him because it was on time) was late, is competent. *Railway Company v. Herrick*, 49 Oh. St. 25 (1892).

OTHER INSTANCES. — The fact that a statement has been made in the presence of a party and his action in connection with the statement are not objectionable as hearsay. The statement is not admitted as evidence of the truth of what is said, "but simply to show what it is that calls for a reply, and the action of the defendant himself under the circumstances, as indicating an acquiescence in, or repudiation of, the truth of the statement." *People v. McCrea*, 32 Cal. 98 (1867); *Green v. Bedell*, 48 N. H. 546 (1869).

It is on this principle that to discredit a witness he may be asked whether he has not stated differently than at the trial at another time, and if such prior statement is denied, and is on a material point, it may be proved. The prior statement is not offered as evidence of the truth of what it says, but because the existence of such a prior statement, true or false, discredits the witness. *State v. Blake*, 25 Me. 350 (1845).

Where it is claimed that evidence is given under the influence of bias, interest or other improper motive, evidence is competent of prior consistent statements of the witness made before the bias, interest, or other improper motive could have operated. It is the fact that such a statement was made which alone is admitted.

On a question of pauper settlement, the place which the pauper regarded as home may be proved by his declarations. *New Milford v. Sherman*, 21 Conn. 101 (1851).

Where conversations by third parties with a witness is what called his attention to a fact or impressed it upon his memory, such conversations are competent. "Whether the statement of the third person was true or false was perfectly immaterial. The fact that the communication was made to the witness, and not its truth or falsity, was the only material point. The conversations were not hearsay, within the proper meaning of that term, but were original and independent facts, and therefore admissible in evidence." *State v. Fox*, 25 N. J. Law, 566 (1856).

FRESH COMPLAINT, &c. — In certain witnesses, the making of a certain statement may be a fact tending to corroborate a witness.

The rule that in cases of rape, attempts at rape, and assault with intent to commit rape, the fact of complaint by the injured female is admissible seems to be more easily explained as that it is the fact of the statement, or circumstantial evidence in favor of the complainant, rather than the truth of it which is admitted. Thus, in case of rape, *McMurrin v. Rigby*, 80 Ia. 322 (1890); *Burt v. State*, 23 Oh. St. 394, 401 (1872); *State v. Warner*, 74 Mo. 83 (1881); *State v. Niles*, 47 Vt. 82 (1874).; *Griffin v. State*, 76 Ala. 29 (1884); *State v. Knapp*, 45 N. H. 148 (1863); *Brown v. People*, 36 Mich. 203 (1877).

The rule is the same in a civil action by a parent to recover damages for an indecent assault upon his minor daughter. *Gardner v. Kellogg*, 23 Minn. 463 (1877).

So of an attempt to commit rape. *Perfelling v. State*, 40 Tex. 486 (1874).

In Ohio, "the well settled law" is "that the declarations of the prosecuting witness, made immediately or soon after the commission of the alleged rape, may be received in evidence. They are to be received, not as evidence of their own truth, not as evidence of the guilt of the defendant, but merely in 'corroboration' of the prosecuting witness, in the sense that they remove from her testimony a cloud of suspicion which might otherwise rest upon it." *Burt v. State*, 23 Oh. St. 394 (1872). The rule also extends to the admission of the particulars of the assault. *Dunn v. State*, 45 Oh. St. 249 (1887). "The complaint constitutes no part of the *res gestæ*; it is only a fact corroborative of the testimony of the complainant; and, where she is not a witness in the case, it is wholly inadmissible." *State v. Clark*, 69 Ia. 294 (1886). "They are merely hearsay, and are not competent as evidence in chief to prove the commission of the offense." *Dunn v. State*, 45 Oh. St. 249 (1887).

The particulars of the complaint cannot be proved by the government. The only competent fact is the circumstantial evidence furnished by the existence of a fresh complaint. *McMurrin v. Rigby*, 80 Ia. 322 (1890); *State v. Niles*, 47 Vt. 82 (1874); *Lacy v. State*, 45 Ala. 80 (1871); *State v. Jones*, 61 Mo. 232 (1875); *Pefferling v. State*, 40 Tex. 486 (1874).

Not even where the particulars are set forth in a letter can they be shown to corroborate the prosecutrix. *State v. Clark*, 69 Ia. 294 (1886). To the contrary, see *Dunn v. State*, 45 Oh. St. 249 (1887). Where the attempt is made to impeach the complainant, evidence is admissible of the particulars of her former complaints to show that they correspond with the evidence on the trial. *Griffin v. State*, 76 Ala. 29 (1884); *Pefferling v. State*, 40 Tex. 486 (1874); *State v. Kinney*, 44 Conn. 153 (1876); *State v. Freeman*, 100 N. C. 429 (1888).

The fact that the complaint related to the defendant can be given in evidence. *Burt v. State*, 23 Oh. St. 394 (1872).

To the contrary, see *State v. Niles*, 47 Vt. 82 (1874); *Griffin v. State*, 76 Ala. 29 (1884).

Time is not the sole test of what constitutes a fresh complaint. The entire surrounding facts must be taken into consideration, and a reasonable excuse may exist for even protracted silence.

That complainant did not confide to her mother, with whom she resided, knowledge of an alleged assault by her stepfather for two months, and only revealed the facts upon an absence from home, and in response to the questions of a person hostile to the accused is not a sufficient objection to receiving the evidence. *State v. Niles*, 47 Vt. 82 (1874).

In Ohio, the particulars of the complaint are admitted, and the rule is assimilated more strongly to those regulating the *res gestæ*. "They are presumed to be the natural outburst of outraged feelings, and; if made at all, would naturally be made at the first opportunity, while the injury is yet fresh and aggravating." *Dunn v. State*, 45 Oh. St. 249 (1887).

"If such complaints are not made soon, or within a reasonable time after the injury, or without any inconsistent delay, it is a strong, though not conclusive, presumption against the truth of the charge." *State v. Knapp*, 45 N. H. 148 (1863).

A delay of eleven months, unexplained, will prevent the admission of the complaint in evidence. "The outrage in such a case upon a virtuous female is so great that there is a natural presumption that at the first suitable opportunity she would make disclosure of it; and she would be so far discredited if she did not make the disclosure, for the purpose of confirming her evidence where she is a witness, such disclosure may be received. But where the disclosure is not recent, as soon as suitable opportunity is furnished, the reason for receiving it in evidence does not exist, and the principle justifying its reception does not apply." *People v. O'Sullivan*, 104 N. Y. 481 (1857).

The defendant may bring out the particulars of the complaint upon cross-examination. *Griffin v. State*, 76 Ala. 29 (1884).

Where the complaint is practically contemporaneous with the injury, the particulars of the complaint have been admitted as part of the *res gestæ*. *Griffin v. State*, 76 Ala. 29 (1884); *McMath v. State*, 55 Ga. 303 (1875).

Thus where a witness, the complainant's sister, saw the defendant holding the complainant, who was crying, on his lap, holding her hands, and urging her "never to dare to mention it," the court regard the particulars of the complaint as "admissible as part of the *res gestæ*. It was made but a few moments after the alleged ravishment had been accomplished, and while declarant was under

the influence of the mental excitement which it produced. It was made within such time after the act to which it referred, and under such circumstances, as to preclude the element of premeditation." *McMurrin v. Rigby*, 80 Ia. 322 (1890).

If the party assaulted is an infant of tender years, it is not necessary in all cases that she should testify to have her contemporaneous declarations admitted as part of the *res gestæ*. *McMath v. State*, 55 Ga. 303 (1875).

In like manner, on a bastardy complaint, it being in evidence that the complainant accused the defendant at the time of her travail as being the father of her child, the fact was elicited, on cross-examination, that her mother told her she must do so. To meet the defence that the mother was the instigator of the charge, evidence of a prior disclosure to the mother is competent. "Her statement, therefore, if she made any, was in itself a fact; and its occurrence might be proved by any competent evidence. For upon this question the inquiry was not whether her accusation was true, but whether the advice and instruction which the mother gave to her daughter was in consequence of information previously received from her." *Mange v. Holmes*, 7 All. 136 (1863).

REPUTATION. — In like manner, reputation, though frequently hearsay, or even hearsay distilled, as it were, can be proved where the existence of the reputation, rather than the truth of its purport, is a relevant fact.

Where the question is, whether A. had reasonable cause to believe that B. was insolvent at the time of a certain conveyance, it is "clearly competent" to show that he was "reputed to be insolvent." *Lea v. Kilburn*, 3 Gray, 594 (1854). "Or was in good pecuniary credit in his neighborhood." *Whitcher v. Shattuck*, 3 All. 319 (1862). In the same way, where it is claimed that the defendant was negligent in hiring a servant infirm in sight, hearing, and physical strength, the plaintiff may show, "for the purpose of proving that the defendant either knew of these infirmities, or by the exercise of reasonable care would have known of them," may show that he was generally so reputed. *Monahan v. Worcester*, 150 Mass. 439 (1890).

So the *credit* of a person in a community frequently is derived from hearsay, but may be testified to as a matter of opinion. *Hard v. Brown*, 18 Vt. 87 (1846); *Bank v. Rutland*, 33 Vt. 414 (1860).

The fact that an alleged lender had no money to lend cannot be shown by evidence of his financial reputation. "In none of these cases was any attempt made to introduce evidence of the financial reputation of the lender; and we have found no case where such evidence has been admitted on the issue of the making of a loan. 'Reputation,' as said by Le Blanc, J., in *Higham v. Ridgway*, 10 East, 109, 120 (1808), 'is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed

down from one to another.' The general rule is that hearsay evidence is to be excluded. To this rule there are certain well-defined exceptions; but the case at bar does not fall within any of them. There is a class of cases relied upon by the defendant, where evidence of reputation has been admitted, namely, where a conveyance is sought to be set aside as a fraudulent preference, and the question is whether the grantee had reasonable cause to believe that the grantor was solvent or insolvent at the time of the making of the conveyance. Here the inquiry is as to the state of mind or belief of the grantee, and it is said that any evidence is competent which tends to show the existence of such facts or circumstances as would naturally influence the mind of an honest and reasonable man in forming a conclusion in relation to the subject matter involved in the issue." *Bliss v. Johnson*, 162 Mass. 323 (1894).

"General reputation is not competent evidence to prove the existence of a fact. After a fact has been established by competent proof, general reputation is admissible to show that the party sought to be charged on account of the fact, had knowledge of its existence." *Schlaff v. Louisville, &c. R. R. Co.*, 100 Ala. 377, 388 (1893).

Reputation for sobriety, &c., cannot be used as proof of the fact. If the reputation is offered as evidence of knowledge, the offer should be limited, and a general offer is properly rejected. *Stevens v. R. R.*, 100 Cal. 554 (1893). The character of a house as a bawdy house cannot be proved by its reputation. *Barker v. Com.*, 90 Va. 820 (1894); *McGregor v. Hudson (Tex.)*, 30 S. W. 489 (1895).

So of a person's pecuniary condition generally. "Where particular knowledge of a fact is sought to be brought home to a party, evidence of the general reputation and belief of the existence of that fact among his neighbors is admissible to the jury as tending to show that he also had knowledge as well as they." *Benoist v. Darby*, 12 Mo. 196 (1848). "General knowledge of a fact in a community may be proved, as evidence tending to trace notice of such fact, its existence being otherwise shown." *Hodges v. Coleman*, 76 Ala. 103 (1884); *Louisville, &c. R. R. v. Hall*, 87 Ala. 708 (1888); *Kuglar v. Garner*, 74 Ga. 765 (1885). In like manner, the fact that the intemperate habits of the person to whom liquor was sold were notorious in the neighborhood in which the defendant lived is proper evidence for the consideration of the jury in determining whether his habits were known to the defendant. "The principle upon which these decisions rest is, that if the existence of a fact is shown, and it is also proved that a party was in a situation and had opportunities to know of it, this is evidence tending to prove that he did know of it." *Stallings v. State*, 33 Ala. 425 (1859); *Adams v. State*, 25 Oh. St. 584 (1874). On the other hand, in an action for gelding plaintiff's horse, knowing that it was kept as a stallion, evidence that the fact of plaintiff's horse was "generally known" to be kept

for that purpose is not competent. *Tucker v. Constable*, 16 Oreg. 407 (1888).

Certain cases have gone further, and held that reputation is evidence of the fact it alleges. It is doubtful whether such holding is not a plain infringement of the rule against hearsay. Thus, in a question whether a slave was bought with the *intention* of taking him beyond the state, "his general character as a negro trader is relevant." *Taylor v. Horsey*, 5 Harr. 131 (1849). That one was a deputy of the sheriff may be proved by reputation. *Holt v. Jarvis, Draper* (K. B., U. C.), 190 (1830). Reputation has also been admitted, together with long-continued absence, to prove the fact of death. *Primm v. Stewart*, 7 Tex. 181 (1851).

The character of a house as disorderly may, it has been held, be established by proof of its reputation. *Stone v. State*, 22 Tex. App. 185 (1886). To the contrary effect, see *Handy v. State*, 63 Miss. 207 (1885); *Wooster v. State*, 55 Ala. 217 (1876); *Smith v. Com.*, 6 B. Monr. 21 (1845); *U. S. v. Jourdine*, 4 Cranch, C. Ct. 338 (1833).

It may be contended that the hearsay rule proceeds in part upon the theory that the fact that A., not a witness, makes a statement is slight circumstantial evidence of the truth of what he asserts, and that this objection of lack of probative force hardly applies to instances of a general consensus in a community. The rule that admits general reputation as proof of character might constitute an example of acquiescence in this line of reasoning were it not for the fact that proof of character by proof of reputation has been modified by the ancient rules of compurgation.

MARKET VALUE. — Analogous to the rules allowing the proof of reputation is the rule that market value may be shown as a fact, though only embodied hearsay. The relevant fact is the existence of the market value, and proof of its existence establishes the fact it states. *International, &c. R. R. v. Pasture Co.*, 5 Tex. Civ. App. 186 (1893); *Missouri, &c. R. R. v. Cocreham* (Tex.), 30 S. W. 1118 (1895). So a Parisian price-current delivered by the dealer to the purchaser will be received as evidence of the market value of certain wines. "We think that the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business." *Cliquot's Champagne*, 3 Wall. 114 (1865).

A witness is competent to testify to the market price of peas in New York, though he has never resided there, if he is in the produce business and obtained his knowledge of prices from his correspondents. "As a general rule, the market value of any particular article, at a given time, is determined by the dealings of many different individuals in such articles, and a knowledge thereof can only be obtained by information from others." *Laurent v. Vaughn*, 30 Vt. 90 (1858). In the same way, merchandise brokers doing busi-

ness in Boston and New York, and conversant with the market value of sales of gunny bags during the time covered by a certain contract "from daily price-current lists and returns of sales furnished them in Boston from New York may testify as to the market value of gunny bags in the New York market at said time." *Whitney v. Thacher*, 117 Mass. 523 (1875). "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify." *Ibid.*

A witness may testify as to the market value of logs, though he is without actual personal knowledge of sales. "Value in a business sense consists largely of the opinions of persons familiar with the market, and these opinions are largely made up of what is said and reported by others. Hence, if a person shows that his business is such that, by commercial reports or other means of like nature, he is familiar with the current market prices of an article, he is competent to testify on the subject, although he may not have actual personal knowledge of any particular sales." *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548 (1889).

But it has been held in New York that a mere price current in a newspaper is not competent evidence of market value, "without some proof showing how and in what manner it was made up; where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales, or otherwise. . . . The credit to be given to such testimony must be governed by extrinsic evidence, and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out." *Whelan v. Lynch*, 60 N. Y. 469 (1895).

Local newspaper quotations as to the price of merchandise at the point of consignment have, however, been held admissible when value is a material fact. *Peter v. Thickstun*, 51 Mich. 589 (1883).

"If, however, there be no market price at such place, by reason of the want of dealers or the want of the commodity, then the actual value at such place can be ascertained by proof of market value in other markets, . . . such other markets to be at the nearest points where goods of the quality and quantity can be bought or sold." *McDonald v. Unaka Timber Co.*, 88 Tenn. 38 (1889).

The estimated cost value placed on certain lands by the neighborhood generally is incompetent. *Powell v. Governor*, 9 Ala. 36 (1846).

CHAPTER III.

MATTERS OF PUBLIC AND GENERAL INTEREST.

§ 607.¹ HAVING illustrated the nature of hearsay evidence, shown the reasons on which it is generally excluded, and explained the distinction between such evidence and that which is original, it will next be convenient to consider *the cases in which the rule rejecting hearsay has been relaxed*. These may be conveniently divided into six classes: first, those relating to matters of public and general interest; secondly, those relating to pedigree; thirdly, those relating to ancient possession; fourthly, declarations against interest; fifthly, declarations in the course of office or business; and lastly, dying declarations. It will be observed, that these exceptions, which are allowed only on the ground of the assumed absence of better evidence, and, as it were, from necessity, meet most of the inconveniences that would result from a stern and universal application of the rule, and thus remove the principal objections which have been urged against it. These six exceptions will now be discussed in their order.

§ 608. And *first*, the admissibility of hearsay evidence respecting matters of *public and general interest*, rests mainly on the following grounds:—that the origin of the rights claimed is usually so ancient, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and as the nature of such rights much lessens the probability, if it does not exclude the possibility, of individual bias, what is dropped in conversation respecting them may be presumed

¹ Gr. Ev. § 127, in part.

to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements advanced were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all more or less interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every member of the community is supposed to be privy, and to contribute his share.¹

§ 609.² In speaking of matters of public and general interest, the terms “public” and “general” are sometimes used as synonyms, meaning merely what concerns a multitude of persons.³ But, in regard to the admissibility of hearsay testimony, a distinction has been taken between them; the term *public* being strictly applied to that which concerns *every member* of the state; and the term *general* being confined to a lesser, though still a considerable, portion of the community. This distinction should be carefully attended to, because in matters strictly public, such, for example, as a claim of highway or a right of ferry, reputation from *any one* appears to be receivable. Declarations would, indeed, be practically worthless, unless made by persons who, by living in the neighbourhood, or by frequently using the road or ferry, or the like, are shown to have had some means of knowledge. Yet the want of proof of the connexion of the declarants with the subject in question seems to affect the value only, and not the admissibility, of the evidence. If, however, the right in dispute be simply general, that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place or business would be probably altogether inadmissible.⁴ *Competent*

¹ Wright v. Doe d. Tatham, 1837 (Coltman, J.); S. C. (Alderson, B.); Morewood v. Wood, 1792 (Ld. Kenyon); Weeks v. Sparke, 1813 (Ld. Ellenborough); Berkeley Peer., 1811 (Sir J. Mansfield); R. v. Bedfordshire, 1855 (Ld. Campbell), adopting almost the language above employed.

² Gr. Ev. § 128, in part.

³ Pim v. Curell, 1840.

⁴ Crease v. Barrett, 1835 (Parke, B.). By Roman law, reputation, or common fame, seems to have been admissible in evidence in all cases; but it was not generally deemed sufficient proof, and, in some cases, not even *semiplena probatio*, unless corroborated; *nisi aliis adminiculis ad-*

knowledge in the declarant is an essential pre-requisite to the admission of his testimony; and although all the Queen's subjects are presumed to have that knowledge, in some degree, where the matter is of public concernment, yet in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required.¹

§ 610. For example, in a dispute as to the existence of a local custom, in which all the tenants of a manor were interested, evidence of reputation would be admissible, not only from any deceased tenant, but from any deceased resident within the manor; for it might fairly be presumed that the residents, being persons conversant with the neighbourhood, would be acquainted with the local customs.² Therefore^{2a} on a question whether Nottingham Castle was within the hundred of Broxtowe, certain ancient orders, made by the Justices at the Quarter Sessions for the county, describing the castle as being within that hundred, were held admissible evidence of reputation; the justices, though not proved to have been residents within the county or hundred, being presumed, from the nature and character of their offices alone, to have been acquainted with the subject in dispute.³

juvetur. 1 Masc. de Prob., Concl. 171, n. 1; Concl. 183, n. 2; Concl. 547, n. 19. It was held sufficient, *plena probatio*, wherever, from the nature of the case, better evidence was not attainable; *ubi à communiter accidentibus, probatio difficilis est, fama plenam solet probationem facere; ut in probatione filiationes.* But Mascardus deems it not sufficient, in cases of pedigree within the memory of man, which he limits to fifty-six years, unless aided by other evidence—*tunc nempe non sufficeret publica vox et fama, sed una cum ipsâ deberet tractatus et nominatio probari, vel alia adminicula urgentia adhiberi.* 1 Masc. de Prob., Concl. 411, n. 1, 2, 6, 7.

¹ See infra, §§ 616 et seq.

² *Ld. Dunraven v. Llewellyn*, 1850 (Parke, B.). See *Warrick v. Queen's Coll.*, Oxford, 1871 (*Ld. Hatherley, C.*). The actual discussion of the subject in the neighbourhood, was a fact also relied on, in the Roman law, in cases of proof by common fame. "Quando testis vult probare aliquem

scivisse, non videtur sufficere, quod dicat ille scivit quia erat vicinus; sed debet addere, in vicinia hoc erat cognitum per famam, vel alio modo; et ideo iste, qui erat vicinus, potuit id scire." 2 Menoch. de Præs. lib. 6, Præs. 24, n. 17, p. 772. See, also, 1 Masc. de Prob. 389, 390, Concl. 395, n. 1, 2, 19, 9, where the law is thus laid down:—"Confines probantur per testes. Verum scias velim, testes in hac materiâ, qui vicini, et circum ibi habitant, esse magis idoneos quam alios. Si testes non sentiant commodum vel incommodum immediatum, possint pro suâ communitate deponere. Licet hujusmodi testes sint de universitate, et deponant super confinibus suæ universitatis, probant, dummodum præcipuum ipsi commodum non sentiant licet inferant commodum in universum."

^{2a} *Gr. Ev.* § 129, in part.

³ *D. of Newcastle v. Broxtowe*, 1832.

C. III.] DECLARANT MUST HAVE COMPETENT KNOWLEDGE.

§ 611. Again, on a question as to the custom of mining in a particular district, persons, under whose estates the minerals lay, with respect to which the custom was said to exist, were held sufficiently connected with the subject to make their declarations evidence, as they were more likely than others living at a distance to become adventurers, and consequently to be subjected to the operation of the custom.¹ But where the question was, whether the city of Chester anciently formed part of the County Palatine, an old document, purporting to be a decree of certain law officers and dignitaries of the Crown, not having authority as a court, was held inadmissible as evidence of reputation, because it was not shown that the persons making it had any peculiar knowledge of the subject, excepting what they derived in the course of that one unauthorised proceeding.²

§ 612. If, however, the quality of the hearsay itself raises a natural inference that the persons from whom it was derived must have been specially acquainted with the locality, the courts will not require independent proof of that fact. The case just mentioned as to whether Nottingham Castle was within Broxtowe Hundred is an instance of this. Other examples are that on a question turning on a manorial custom, depositions, purporting to have been made by copyholders in an ancient suit between a former lord and a person claiming admission to a copyhold, were admitted in evidence without proof that the persons making them were either copyholders, or were otherwise acquainted with the customs of the manor, since it must be assumed that such persons would not have been brought forward as witnesses, had they been ignorant of the subject;³ and where an ancient unsigned customary of a manor, purported to be *ex assensu omnium tenentium*, had been handed down with the court rolls from steward to steward, it was received as evidence to prove the course of descent within the manor.⁴ Where, however, to prove the boundaries of a manor, an ancient survey which purported to have

¹ Crease v. Barrett, 1835.

² Rogers v. Wood, 1831; recognized by the Ct. of Ex. in Crease v. Barrett, 1835. See, also, Evans v. Taylor, 1838. But see Freeman v.

Read, 1863.

³ Freeman v. Phillipps, 1816.

⁴ Denn v. Spray, 1786. See Chapman v. Cowlan, 1810.

been made in the time of Queen Elizabeth by a deputy surveyor appointed by the Crown, and to have been founded on the presentments of certain tenants of the manor, whose names were appended to it, was produced from the proper custody, the court rejected it on the ground that no proof had been given that the deputy surveyor had any authority to institute the inquiry; and, stripped of this authority, he not only had no right to make any kind of return, but the presumption that he did make one fell to the ground. The paper might, it was said, have been written by any clerk idling in the office where it was found, from his own imagination, or compiled, possibly, by some interested person in furtherance of a sinister object of his own.¹

§ 613. It may be expedient to here enumerate a few of the principal questions which have been deemed to involve matters of public or general interest, so that evidence of *reputation* (in other words, "hearsay") may be admitted, and then by way of contrast to enumerate a few of the cases which were considered of a *private* nature, so that this sort of evidence is inadmissible. On the one hand, the following will be regarded as questions of public or general interest: questions relating to a right of common existing by immemorial custom,² a feeding per cause de vicinage resting on a similar foundation,³ a parochial⁴ or other district modus,⁵ a manorial custom,⁶ a custom of mining in a particular district,⁷ a custom of a corporation to exclude foreigners from trading within a town,⁸ the limits of a town,⁹ the extent of a parish,¹⁰ the boundary between counties, parishes, hamlets, or manors,¹¹ or even between a *reputed* manor (that is, an estate which from some intervening defect has ceased to be an actual manor) and the freehold of a

¹ *Evans v. Taylor*, 1838. See, also, *D. of Beaufort v. Smith*, 1849; *Daniel v. Wilkin*, 1852. But see *Freeman v. Read*, 1849; *Smith v. Ld. Brownlow*, 1869; *D. of Devonshire v. Neill*, 1876-7 (*Palles, C.B.*), (*Ir.*).

² *Weeks v. Sparke*, 1813, explained in *Ld. Dunraven v. Llewellyn*, 1850.

³ *Prichard v. Powell*, 1845, explained in *Ld. Dunraven v. Llewellyn*, 1850.

⁴ *Moseley v. Davies*, 1822; *White*

v. Lisle, 1819; *Short v. Lee*, 1821.

⁵ *Rudd v. Wright*, 1832.

⁶ *Doe v. Sisson*, 1810.

⁷ *Crease v. Barrett*, 1834.

⁸ *Davies v. Morgan*, 1831.

⁹ *Ireland v. Powell*, 1802, cited (*Chambre, J.*) and recognized (*Williams, J.*) in *R. v. Bliss*, 1837.

¹⁰ *R. v. Mytton*, 1860.

¹¹ *Nicholls v. Parker*, 1811; *Brisco v. Lomax*, 1838; *Evans v. Rees*, 1839; *Plaxton v. Dare*, 1829; *Thomas v. Jenkins*, 1837.

private individual,¹ or between *old* and *new* land in a manor,² a claim of tolls on a public road,³ the fact whether a road was public or private,⁴ a prescriptive liability to repair sea-walls,⁵ or bridges,⁶ a claim of highway,⁷ a right of ferry,⁸ the fact whether land on a river was a public landing-place or not,⁹ the existence and rights of a parochial chapelry,¹⁰ the jurisdiction of a court, and the fact whether it was a court of record or not,¹¹ the existence of a manor,¹² a prescriptive right of toll on all malt brought by the west country barges to London,¹³ a right by immemorial custom, claimed by the deputy day meters of London, to measure, shovel, unload and deliver all oysters brought by boat for sale within the limits of the port of London,¹⁴ a claim by the lord of a manor to all coals lying under a certain district of the manor,¹⁵ a claim of heriot custom in respect of freehold tenements within a manor held in fee-simple,¹⁶ a custom of electing churchwardens by a select committee,¹⁷ and a prescriptive right to free warren as appurtenant to an entire manor.¹⁸

§ 614. On the other hand, it has been considered that evidence of *reputation as to them must be rejected*, and that the following were mere *private* rights; namely, questions as to what usage had obtained in electing a schoolmaster to a grammar school,¹⁹ whether the sheriff of the county of Chester, or the corporation of the city of Chester, was bound to execute criminals,²⁰ whether certain tenants of a manor had *prescriptive* rights of common for cattle levant and couchant,²¹ what were the boundaries of a waste over which many

¹ Doe v. Sleeman, 1846.

² Barnes v. Mawson, 1813.

³ Brett v. Beales, 1829 (Ld. Tenterden).

⁴ R. v. Bliss, 1837 (Williams, J.).

⁵ R. v. Leigh, 1840. The mere fact that each frontager has always repaired the sea wall in front of his land is not, in itself, sufficient evidence of a prescriptive liability to maintain the wall: Hudson v. Tabor, 1877, C. A.

⁶ R. v. Sutton, 1838.

⁷ Crease v. Barrett, 1834 (Parke, B.); Reed v. Jackson, 1881.

⁸ Pim v. Curell, 1840.

⁹ Drinkwater v. Porter, 1835 (Coleridge, J.).

¹⁰ Carr v. Mostyn, 1850.

¹¹ Goodtitle v. Dew, 1802.

¹² Steel v. Prickett, 1819 (Abbott, C.J.); Curzon v. Lomax, 1803 (Ld. Ellenborough).

¹³ City of London v. Clerke, 1690; D. of Beaufort v. Smith, 1849.

¹⁴ Laybourn v. Crisp, 1838.

¹⁵ Barnes v. Mawson, 1813. In that case evidence was given of an uniform exercise of the right.

¹⁶ Damerell v. Protheroe, 1847.

¹⁷ Berry v. Banner, 1792.

¹⁸ Ld. Carnarvon v. Villebois, 1844.

¹⁹ Withnell v. Gartham, 1795 (Ld. Kenyon).

²⁰ R. v. Antrobus, 1835.

²¹ See Ld. Dunraven v. Llewellyn,

of the tenants of a manor claimed a right of common appendant,¹ whether the lord of a manor had a prescriptive right to all wreck within his manorial boundaries,² whether the plaintiff was exclusive owner of the soil, or had a right of common only,³ whether certain land in dispute had been purchased by a former occupier, or was part of an entailed estate of which he had been tenant for life,⁴ what patron formerly had the right of presentation to a living,⁵ whether a *farm* modus existed, and what was its nature,⁶ whether a party had a private right of way over a particular field,⁷ whether the tenants of a particular manor had the right of cutting and selling wood,⁸ and what were the boundaries between two private estates.⁹ Where, however, it was shown by direct testimony, the admission of which was unopposed, that the boundaries of a certain farm were identical with those of a hamlet, evidence of reputation as to the hamlet boundaries was let in for the purpose of proving those of the farm.¹⁰ For though it was objected that evidence should not be thus indirectly admitted in a dispute between private individuals, Coleridge, J., observed that "he never heard that a fact was not to be proved in the same manner, when subsidiary, as when it was the very matter in issue."

§ 615. Evidence of reputation would on principle appear not to be admissible to prove or disprove a *private prescriptive right* or liability. Yet whether it is or not is perhaps doubtful.¹¹ Nevertheless, where a prescriptive right of digging stones on a lord's waste was claimed by the defendant, as annexed to his estate, and

1850, overruling *Weeks v. Sparke*, 1813; *Williams v. Morgan*, 1850. See, also, and compare *Warrick v. Queen's Coll.*, Oxford, 1871 (Ld. Hatherley, C.).

¹ Ld. Dunraven v. Llewellyn, 1850.

² *Talbot v. Lewis*, 1834. As to what constitutes "wreck" distinguished from "flotsam," see *Stackpole v. The Queen*, 1875.

³ *Richards v. Bassett*, 1830, *semble* (Littledale, J.). Sed qu.

⁴ *Doe v. Thomas*, 1811.

⁵ Per Ld. Kenyon in *R. v. Eriswell*, 1790, questioning Bp. of Meath v. Ld. Belfield, 1748.

⁶ *Wells v. Jesus College*, 1836 (*Alderson, B.*); *White v. Lisle*, 1819;

Wright v. Rudd, 1832 (Ld. Lyndhurst). See, however, *Webb v. Petts*, (undated); *Donnison v. Elsley*, 1824; and cases cited 1 Ph. Ev. 241, n. 2.

⁷ *Semble* (Dampier, J.), in *Weeks v. Sparke*, 1813; and (Ld. Kenyon), in *Reed v. Jackson*, 1800.

⁸ *Blackett v. Lowes*, 1814 (Ld. Ellenborough).

⁹ *Clothier v. Chapman*, 1805. By the Roman law, evidence of reputation seems to have been deemed admissible, even in matters of private boundary. See 1 Masc. de Prob. 391, Concl. 396.

¹⁰ *Thomas v. Jenkins*, 1826. See, also, *Brisco v. Lomax*, 1838.

¹¹ See *Prichard v. Powell*, 1845.

the lord offered evidence of reputation to prove that no such right existed, the court was equally divided on its admissibility.¹ On the trial, however, of an indictment against the inhabitants of a county for the non-repair of a public bridge, to which the defendant pleaded that certain persons named were liable to repair the bridge *ratione tenuræ*, evidence of reputation was admissible to support the plea,² it being considered that the fixing an individual with, or the relieving him from, such a liability as the one in question, had a necessary tendency to abridge or increase the liability of the whole neighbourhood,³—and, moreover, that the admissibility of evidence of reputation, when tendered to *disprove* a public liability or right, cannot be governed by a different principle from that which prevails, when such evidence is offered to *establish* the liability or right.⁴

§ 616.⁵ The reason generally assigned for rejecting evidence of reputation or common fame, in matters of mere *private right* is the probable *want of competent knowledge* in the declarant. “Evidence of reputation upon general points is receivable,” said Lord Kenyon, “because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs, or private prescriptions? How is it possible for strangers to know anything of what concerns only private titles?”⁶ It may not indeed on all occasions be an easy matter to distinguish between public and private rights, and some few of the cases cited above may possibly be considered to rest on somewhat doubtful reasoning. Still, the general rule of

¹ *Morewood v. Wood*, 1792. Since it is difficult to see how the public could have been interested in the matter, unless it had been shown (which it was not) that the rights of the commoners were infringed by the defendant's claim, such evidence would probably at the present day be rejected. See, also, §§ 610, 611.

² *R. v. Bedfordshire*, 1855; overruling *R. v. Wavertree*, 1841, and confirming *R. v. Cotton*, 1813.

³ See *Prichard v. Powell*, 1845 (*Patteson, J.*).

⁴ See *Drinkwater v. Porter*, 1835 (*Coleridge, J.*); and post, § 620. The two cases are probably explicable on the strict ground that, in the one first cited, the public were not interested in the dispute, while in the last named they were.

⁵ *Gr. Ev.* § 137, in part.

⁶ *Morewood v. Wood*, 1792.

law cannot be disputed; namely, that if the matter in question be of a public or general nature,—that is, if it be interesting to the community at large, or even to a comparatively small portion of the community, such, for example, as the inhabitants of a parish, a town, or a manor,—it falls within the exception by which evidence of reputation is admitted; whereas, if it have no connexion with the exercise of any public right, or the discharge of any public duty, or with any other subject of general interest, it falls within the ordinary rule by which hearsay evidence is excluded.

§ 617.¹ The necessity for competent knowledge in the declarant may serve to explain and reconcile what is said in the books respecting the inadmissibility of *reputation* in regard to *particular facts*. Upon *general* points, as we have seen, such evidence is receivable, because of the general interest which the community have in them. But particular facts, not being equally notorious, may be misrepresented, or misunderstood, and may have been connected with other facts, by which, if known, their effect might be limited or explained; and, therefore, evidence of reputation as to the existence of such particular facts is rejected. For instance, if the question be whether a road be public or private, declarations by old persons since dead, *that they have seen repairs done upon it*, will not be admissible;² neither can evidence be received that a deceased person planted a tree near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy;³ nor can proof of old persons having been heard to say that a stone was erected, or boys whipped, or cakes distributed, at a particular place, be received as evidence of boundary.⁴ And where the question was whether a turnpike stood within the limits of a town, declarations by old people, since dead, that formerly houses stood where none any longer remained, was rejected, on the ground that these statements were evidence of a particular fact.⁵ If, too, the existence

¹ Gr. Ev. § 138, in part.

² Per Patteson, J., in *R. v. Bliss*, 1837.

R. v. Bliss, 1837.

⁴ Per Coleridge, J., in *R. v. Bliss*, 1837.

⁵ *Ireland v. Powell*, 1802 (Chambre, J.), cited by Williams, J., in *R.*

and amount of a parochial modus be in issue, hearsay evidence of the payment of a specific sum in lieu of tithes by a deceased occupier will be inadmissible; though general evidence of reputation, that it has always been customary to pay that sum for all the lands in the parish, will be received.¹

§ 618. Similarly, on a question whether a certain place was parcel of a particular parish, an old book containing entries by a deceased churchwarden, not charging himself, but relating to the repairs of a chapel alleged to belong to the place in question, have been held inadmissible;² and so have been also entries in parish books, which recorded the fact that perambulations had taken a particular line.³ Still, it has been usual to admit evidence of what old persons, since deceased, who accompanied the perambulators, have been heard to say upon such occasions;⁴ because the custom of perambulating parishes having long received high judicial sanction as a legitimate mode of recording boundaries,⁵—and the fact of a perambulation having taken place being considered in itself evidence of the exercise of a right,⁶—it follows that statements made by perambulators may be regarded as declarations accompanying acts, which, on grounds already explained,⁷ will be admissible in evidence, provided they are not confined to particular circumstances.⁸

§ 619. It is now⁹ held that proof of the exercise of the right claimed within the period of living memory, is not an essential condition of the reception of evidence of reputation; though, of course, the absence of such proof, in cases where the nature of the subject admits of its production, will materially affect the value of hearsay when received.¹⁰ Neither is it necessary that the opinions

v. Bliss, 1837. On the other hand, in the same case, evidence of reputation to show that the town extended to a certain point was received, as the limits of the town were a matter of general public interest.

¹ *Harwood v. Sims*, 1810, more fully reported and explained in *Moseley v. Davies*, 1822; *Chatfield v. Fryer*, 1815; *Garnons v. Barnard*, 1793; *Wells v. Jesus College*, 1836; *Deacle v. Hancock*, 1824. See, also, *Crease v. Barrett*, 1835.

² *Cooke v. Banks*, 1826 (*Abbott, C.J.*).

³ *Taylor v. Devey*, 1837.

⁴ *Weeks v. Sparke*, 1813 (*Ld. Ellenborough, and Le Blanc, J.*).

⁵ *Taylor v. Devey*, 1837.

⁶ *Weeks v. Sparke*, 1813.

⁷ *Ante*, §§ 583—588.

⁸ 1 Ph. Ev. 248.

⁹ *Per Buller, J.*, in *Morewood v. Wood*, 1792; *Weeks v. Sparke*, 1813 (*Le Blanc and Dampier, JJ.*).

¹⁰ *Crease v. Barrett*, 1835; *Ld.*

of deceased persons, which are tendered as evidence of common fame, should appear to rest on reputation derived from others, or should have been expressed in the course of a transaction relating to a question of reputation. Therefore, on an issue whether or not a lane in a certain hamlet was a common highway, a paper signed by several inhabitants of the hamlet, since dead, stating that the lane was not a highway, was received as slight evidence of reputation, although it had been drawn up at a public meeting, which had been convened for the sole purpose of considering the propriety of repairing the road, and although the opinions expressed in the document did not appear to have been founded on reputation received from others.¹

§ 620.² Reputation is evidence as well *against a public right* as in its favour; and this, too, whether the evidence consist of declarations which expressly negative the right, or set up an inconsistent claim, or simply omit all mention of the right on some occasion, when a notice of it might be reasonably expected. In accordance with this principle, where the question was, whether a landing-place was public or private property, the declarations of ancient deceased persons, that it was the private landing-place of the party and his ancestors, have been held admissible;³ and where, to negative the existence of a particular manorial custom, an ancient deed, made between the lord of the manor and a great many of the copyholders, in which the latter claimed, and the former admitted and confirmed, what they mutually conceived to be the immemorial customs of the manor, and in which all mention of the particular custom in question was omitted, was considered evidence of reputation showing that the right claimed did not exist at that day, and that the subsequent usage relied upon in support of it was referable to usurpation, and not to right.⁴

§ 621.⁵ It will have been seen from several of the cases cited in this chapter, that oral declarations are not the sole medium of

Dunraven *v.* Llewellyn, 1850; *R. v.* Sutton, 1838; *Curzon v. Lomax*, 1803 (Ld. Ellenborough); *Steel v. Prickett*, 1819 (Abbott, C.J.); *Roe v. Parker*, 1792 (Grose, J.).

¹ *Barracrough v. Johnson*, 1838.

² Gr. Ev. § 140, in part.

³ *Drinkwater v. Porter*, 1835 (Coleridge, J.).

⁴ *M. of Anglesey v. Ld. Hather-ton*, 1842, in which any actual decision as to fact cited in the text became, however, unnecessary. See *D. of Portland v. Hill*, 1866.

⁵ Gr. Ev. § 139, in part.

proving traditional reputation in matters of public and general interest. Indeed, the principle which makes evidence of reputation admissible at all, applies not only to oral proof but equally to documentary evidence, and to all other kinds of proof denominated hearsay, so that deeds,¹ leases,² and other private documents are admissible, as declaratory of the public matters recited in them. Even copies and abstracts of old deeds and wills³ have occasionally been used for the same purpose. But these are not *in themselves* evidence of reputation, but merely admissible as secondary evidence of the original instruments. Consequently, in strictness, no such document can be received, without some proof being furnished of the former existence and present loss of the originals.⁴

§ 622. *Maps*, showing the boundaries of counties, towns, parishes, or manors, which are not proved to have been prepared by persons who were either deputed to make them by some one interested in the question, or who themselves had apparently some personal knowledge on the subject, or who are shown to have been in some way connected with the district, cannot be received as evidence whatever their age or apparent accuracy may be.⁵ But if proof be forthcoming that they have been either made or recognised by persons having adequate knowledge, they would seem, on principle, to be valid evidence of reputation. Accordingly, where upon the trial of an indictment against a parish for the non-repair of a highway, to show that the road in question was not within the parish, a map was produced which had been made some thirty years before by a surveyor, from information derived from an old parishioner, who had pointed out to him the boundaries, it was held, that, if proof could be given of the old man's death, the map would be admissible as evidence of reputation, though it came from the chest of the parish indicted.⁶ A map made under the authority of the sovereign's commission, adopted in the presentment of a jury acting

¹ *Curzon v. Lomax*, 1803 (Ld. Ellenborough); *Brett v. Beales*, 1829 (Ld. Tenterden).

² *Plaxton v. Dare*, 1820; *Barnes v. Mawson*, 1813; *M. of Anglesey v. Ld. Hatherton*, 1842; *D. of Beaufort v. Smith*, 1849 (Parke, B.).

³ See *Shrewsbury Peer.*, 1857, H. L.; *Braye Peer.*, 1836-9, H. L.

⁴ See and compare *Doe v. Skinner*, 1848; *Doe v. Wittcomb*, 1853, H. L.; *Perth Peer.*, 1846-8, H. L.; and *D. of Devonshire v. Neill*, 1876-7, (Ir.) (Palles, C.B.).

⁵ *Hammond v. Bradstreet*, 1854. See *Pipe v. Fulcher*, 1858.

⁶ *R. v. Milton*, 1843 (Erskine, J.).

under that commission, and acted on for nearly sixty years, is, too, evidence of the limits of a sewer's level.¹ On another occasion, also, maps appear to have been received merely as public documents;² but in an older case, where, in order to prove that the locus in quo was a highway, a copper-plate map, purporting on its face to have been taken by the direction of former churchwardens, which it was proposed to prove was generally received by the parish as authentic, was rejected with the observation, that "it would be equally improper to admit it, as to admit a plan taken by the lord of the manor, who might thereby crush and destroy the estate of his tenants."³ The decision is of the less authority, however, because it does not appear from the report that the map was an ancient one, or that the churchwardens, by whose direction it was drawn, were dead.

§ 623. Again, copies of court rolls, and especially presentments in manor courts,⁴ stating the customs or boundaries of a manor, depositions of conventionary tenants of a manor, taken in an authorised inquiry, and representing the rights of the lord,⁵ and other similar documents, are admissible as evidence of reputation;⁶ though, unless it can be satisfactorily proved, or at least reasonably inferred, that the proceedings were conducted in a legal and regular manner, it will seldom be prudent to run the risk of a new trial by tendering such evidence.⁷

§ 624. *Verdicts of juries, and judgments, decrees, and orders of courts of competent jurisdiction*, are not now⁸ admissible as being actual evidence of reputation.⁹ Nevertheless, these documents, though not reputation, are as good evidence as reputation;¹⁰ and

¹ *New Romney (Mayor) v. New Romney (Commissioners of Sewers)*, 1892.

² *Alcock v. Cook*, 1829 (Best, C.J.). This is evidently the case on which *Tindal, C.J.*, acted in the one referred to in 2 Ph. Ev. 216, n. (e).

³ *Pollard v. Scott*, 1790 (Ld. Kenyon).

⁴ *Evans v. Rees*, 1809; *Roe v. Parker*, 1793; *Arundell v. Ld. Falmouth*, 1814; *Damerell v. Protheroe*, 1847.

⁵ *Crease v. Barrett*, 1835; *Freeman v. Phillipps*, 1816; *Gee v. Ward*, 1857.

⁶ See *Evans v. Taylor*, 1838, as explained in *D. of Beaufort v. Smith*, 1849; *Daniel v. Wilkin*, 1852.

⁷ See *R. v. Leigh*, 1839.

⁸ *Pim v. Curell*, 1840 (Alderson, B.).

⁹ Formerly they were admissible; the doctrine that they were so having, as regards verdicts, taken its rise from the days when juries were summoned *de vicineto*. *Evans v. Rees*, 1839 (Patteson and Coleridge, JJ.); *Brisco v. Lomax*, 1839 (Patteson, J.).

¹⁰ *Brisco v. Lomax*, 1839 (Little-dale, J.).

(whatever be the principle on which they are admitted) the rule has been established by too many authorities to be now questioned,¹ that, in all cases, involving matters of public or general interest, wherein reputation is evidence, a verdict or a judgment upon the matter directly in issue, though pronounced in a cause litigated between strangers to the parties on the record, is also admissible; not as tending to prove *any specific fact existing at the time*, but as evidence of the most solemn kind, of an adjudication by a competent tribunal upon the state of facts and the question of usage at the time.² For example, where a public right of way was in question, the plaintiff was allowed to show a verdict, rendered in his own favour against a defendant in another suit, in which the same right of way was in issue.³ It matters not as to the admissibility (though it may as to the weight) of such evidence whether the judgment has been suffered by default, or, though of a very recent date, is not supported by any proof of execution or of the payment of damages,⁴ or even that the verdict, where one has been obtained, has not been followed up by any judgment or decree.⁵ Neither is it material whether the verdict be one at *Nisi Prius*, or be the finding of a jury summoned under a commission from a Duchy court, or any other special commission. It must, however, be proved, or be inferred from the circumstances, that the inquiry was a lawful one.⁶

§ 625. If, when the record is produced, a direct issue appears to have been raised on the right or custom in controversy, the opponent will not be entitled to show that in fact no evidence was given on that issue; since the record is conclusive of the fact of such a finding, though not of its truth as between other parties.⁷ If the record contains no direct issue on the custom, the party producing it must furnish some evidence to show that the custom was really in question; for, otherwise, the mere verdict would prove nothing.⁸ In an action by the lord of a manor against a

¹ *Evans v. Rees*, 1839 (Ld. Denman).

² *Pim v. Curell*, 1840 (Ld. Abinger); *D. of Devonshire v. Neill*, 1876-7 (Ir.) (Palles, C.B.); *Neill v. D. of Devonshire*, 1882, H. L. (Ld. Selborne, C.).

³ *Reed v. Jackson*, 1801. See *Petrie*

v. Nuttall, 1856.

⁴ *Ld. Carnarvon v. Villebois*, 1844. See *R. v. Brightside Bierlow*, 1849.

⁵ *Brisco v. Lomax*, 1838.

⁶ *Id.*

⁷ *Reed v. Jackson*, 1801.

⁸ *Laybourn v. Crisp*, 1838 (Ld. Abinger).

copyholder for trespassing on his free warren, an ancient judgment on a quo warranto information filed by the Attorney-General against a former lord, in which the defendant pleaded, and the Attorney-General confessed, a prescriptive title to the free warren as appurtenant to the manor, was received in evidence for the plaintiff, as being the judgment of a competent court upon a matter of a public nature, which concerned the Crown and the subject, and being "admissible on the same footing as an allowance before the Justices of Eyre, an inquisition post mortem, or an inquisition issuing out of the Court of Exchequer to ascertain the extent of the Crown lands."¹

§ 626. Decrees and orders of all competent tribunals stand upon the same footing as verdicts.² Therefore, orders of the commissioners of sewers requiring landowners to repair sea-walls, will, on an issue respecting the liability of a party to make such repairs, be evidence as adjudications by a court of competent jurisdiction; and, if they are of an ancient date, it will be presumed that they have been duly executed and acted upon.³ To render decrees of the old Court of Chancery admissible, it is unnecessary to put in the depositions to which they refer; because, in equity, the judge must have collected the questions in dispute from the bill and answer only.⁴ Still, a decree, to be evidence, must be *final*; and mere *interlocutory orders*, not involving any judgment upon the rights of the parties, cannot be received.⁵

§ 626A. So anxious, however, are the courts to confine this species of evidence within strict limits, that they have rejected an award in a suit *inter alios*, though the cause was referred by order of the judge at *Nisi Prius*.⁶

§ 626B. No mere *claim* to the possession of lands, not followed by judgment, will be admissible in evidence,⁷ nor can any verdict, judgment, decree, or order, be received, if it appear that the parties pronouncing it were acting without legal authority.⁸

¹ Earl of Carnarvon *v.* Villebois, 1844 (Parke, B.).

² See Laybourn *v.* Crisp, 1838 (Parke, B.); D. of Devonshire *v.* Neill, 1876-7 (Ir.) (Palles, C.B.).

³ R. *v.* Leigh, 1839; D. of Devonshire *v.* Neill, 1876-7 (Ir.).

⁴ Laybourn *v.* Crisp, 1838. It seems that the depositions may be

read by the opposite party as *his* evidence: *id.*

⁵ Pim *v.* Curell, 1840.

⁶ Evans *v.* Rees, 1839; R. *v.* Cotton, 1813; Wenman *v.* Mackenzie, 1855.

⁷ D. of Devonshire *v.* Neill, 1876-7 (Ir.) (Palles, C.B.).

⁸ Rogers *v.* Wood, 1831.

§ 627. Judgments and decrees must in general be proved either by producing the originals, or by examined, or now by office,¹ copies. Occasionally, however, a copy of a less authentic character than those named will be received, if it has been dealt with by the party against whom it is tendered, or by those through whom he claims, either as an authentic copy (in which case it will be admissible as secondary evidence) or as a paper containing a true statement of the custom or other subject-matter of reputation in dispute (in which case it will be received as primary proof). For instance,² where the question at issue turned on the existence or non-existence of a particular manorial custom, a copy of an old decree of the Court of Chancery in a suit between a copyholder and the lord, establishing the custom, was allowed to be read as secondary evidence of the decree, it being held that, inasmuch as it had been found among the papers of a former deceased lord, that fact furnished some evidence of its having been recognised as a true copy, proof having first been given of an ineffectual search for the original, though it was pointed out by the court that it was inadmissible as primary evidence, since the mere circumstance of its having been deposited among the papers of the deceased lord was not such a dealing with it as to be equivalent to an admission, upon the lord's part, that it contained a true account of the customs of the manor. A second document tendered in evidence in the same case was an office copy³ of another decree, and as there was some evidence to show that this had been given to a witness by the lord as proof of the customs of the manor, the court regarded it in the light of an admission, and held it admissible as primary evidence of those customs.

§ 628.⁴ The doctrine that declarations of deceased persons as to matters of public interest are an exception to the general rule, that hearsay evidence is inadmissible, is subject to an important qualification, which is, that such *declarations, to be admissible as evidence of reputation, must have been made before any controversy arose touching the matter to which they relate*; or, as it is usually expressed, *ante litem motam*. The ground on which the declarations of deceased persons are admitted at all, is, that they are the natural effusions

¹ R. S. C. 1883, Ord. XXXVII.
² *Price v. Woodhouse*, 1849.

³ See post, § 1538.

⁴ Gr. Ev. § 131, in part.

of a party who is presumed to know the real facts, and to speak upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.¹ But no man is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other; their minds are in a ferment; and, if they are disposed to speak the truth, facts are often seen by them through a false medium. To avoid, therefore, the mischiefs which would otherwise result, all *ex parte* declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy.² As the doctrine that declarations cannot be received unless made *ante litem motam*, is not confined to matters of public and general interest, but equally governs the admissibility of hearsay evidence in matters of pedigree, it will be convenient to illustrate its operation by referring indiscriminately to both these classes of cases.

§ 629.³ This rule was familiar in the Roman law; but the term *lis mota* was there applied strictly to the commencement of the action, and was not referred to any earlier period of the dispute.⁴ But in our law the term *lis* is taken in the classical⁵ and larger sense of *controversy*; and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit.⁶ It is now decided that, to render declarations inadmissible as *post litem motam* at the time when they are made, "there must be, not merely facts which may lead to a dispute, but a *lis mota*, or suit, or controversy preparatory to a suit, actually commenced, or dispute arisen, and that upon the very same pedigree or subject-matter which constitutes the question in litigation."⁷

¹ Per *Ld. Eldon*, in *Whitelocke v. Baker*, 1807; *R. v. Cotton*, 1813 (*Dampier, J.*).

² *Berkeley Peer.*, 1811 (*JJ. in H. L.*); *Monkton v. Att.-Gen.*, 1831; *Richards v. Bassett*, 1830.

³ *Gr. Ev.* § 131, in part.

⁴ *Lis est, ut primum in jus, vel in judicium ventum est; antequam in judicium veniatur, controversia est, non lis*: *Cujac. Op. Post.* tom. 5, col. 193, B. and col. 162, D. *Lis inchoata est ordinata per libellum, et satisfactionem, licet non sit lis contestata*: *Corpus*

Juris Glossatum, tom. 1, col. 553, ad *Dig. lib. iv. tit. 6, l. 12. Lis mota censetur, etiamsi solus actor egerit*: *Calv. Lex., Verb. Lis mota*.

⁵ "Philosophi ætatum in litibus conerunt."—*Cic.*; cited (*Lawrence, J.*) in *Berkeley Peer.*, 1811 (*JJ. in H. L.*).

⁶ Per *Sir J. Mansfield*, in *Berkeley Peer.*, 1811 (*JJ. in H. L.*); *Monkton v. Att.-Gen.*, 1831.

⁷ *Davies v. Lowndes*, 1843 (*Ld. Denman*); *Shedden v. Att.-Gen.* and *Patrick*, 1861; *Berkeley Peer.*,

§ 630. From the explanation of *lis mota* given above, three propositions follow. The first proposition is, that declarations will not be rejected, in consequence of their having been made *with the express view of preventing disputes*; and it is exemplified by the judges having unanimously held, in conformity with an earlier opinion expressed by Lord Mansfield,¹ that an entry made by a father in any book, for the express purpose of establishing the legitimacy of his son at the time of his birth, in case the same should be called in question, will be receivable in evidence, notwithstanding the professed view with which it was made,² a doctrine which has since been sanctioned by Lords Brougham³ and Cottenham in England,⁴ and by Lord St. Leonards in Ireland,⁵ and may therefore now be considered as established law in both countries. The second proposition is, that declarations are admissible, if no dispute had arisen when they were made, though they were made in *direct support of the title of the claimant*.⁶ For although a feeling of interest will often cast suspicion on declarations, it has never been held to render them inadmissible. The third proposition is, that the mere fact of the declarant having stood, or thought that he stood, in *pari jure* with the party relying on the declaration, will not render such declaration inadmissible. One peerage case, indeed, appears at first sight to throw some doubt upon the subject;⁷ but it is highly probable that the pedigree was there rejected, not as having been made by a party while standing in the same situation as the claimant, but as having been concocted by such person in direct contemplation of himself laying claim to the dignity.

§ 631. Even if the peerage case just referred to be not susceptible of this explanation, a single isolated decision can scarcely

1811 (JJ. in H. L.); *Slaney v. Wade*, 1836. See *Butler v. Mountgarret*, 1859, H. L.; *Frederick v. Att.-Gen.*, 1874.

¹ *Goodright v. Moss*, 1777. The commencement of the controversy was, at one time, further defined by Alderson, B., to be "the arising of that state of facts on which the claim is founded, without anything more": *Walker v. Beauchamp*, 1834. But this dictum, — though afterwards upheld by Ld. Cottenham (*Davies*

v. Lowndes, 1843), — has since been overruled: *Shedden v. Att.-Gen.* and *Patrick*, 1861; *Reilly v. Fitzgerald*, 1843 (Ir.).

² 4 Camp. 418.

³ *Monkton v. Att.-Gen.* 1831.

⁴ *Slaney v. Wade*, 1836.

⁵ *Reilly v. Fitzgerald*, 1843 (Ir.).

⁶ The leading authority supporting this proposition is *Doe v. Davies*, 1847, whence the remark in the text is taken.

⁷ *Zouch Peer.*, 1807, H. L.

controvert a rule of law, which has been sanctioned and acted upon by numerous judges,¹ and which is so founded on reason that a contrary doctrine would go far towards excluding all evidence of reputation. For instance, in cases of public and general interest, if the circumstance that the declarant stood, or believed he stood, in *pari jure* with the person relying on the declaration were a ground for rejecting the evidence afforded by such declaration, it would be glaringly inconsistent with the rule, which requires the statement to have been made by some person having competent knowledge of the subject.² In cases of pedigree, too, though the result of excluding declarations of persons in *pari jure* would not be equally mischievous, it would frequently have the effect of drying up sources of information which would be highly valuable in the investigation of truth. The circumstances assumed in each one of the cases just supposed may indeed render it very possible that the declarant may have had some secret wish or bias, which may have induced him to make a statement either partially or totally false; but the same observation might apply to all evidence of this nature, and its weight in each particular case must be determined by the jury.

§ 632.³ So much of the rule under consideration as declares that a declaration shall be rejected as having been made *post litem motam* only when the controversy relates to the very same subject-matter as is in question in the litigation in which the declaration is offered as evidence, is based on sound sense. For, the mere discussion of other topics, however similar they may be in their general nature to the real matter in dispute, does not necessarily lead to the inference that that matter was controverted. The reasonableness of the rule is shown by the following illustration:—In a suit between a copyholder and his lord, where the point in issue is, whether a certain customary fine is to be assessed by the jury of the lord's court, depositions taken in an ancient suit against a former lord, where the controversy turned on the

¹ *Moseley v. Davies*, 1822 (Graham, B.); *Harwood v. Sims*, 1810; *Deacle v. Hancock*, 1824; *Monkton v. Att.-Gen.*, 1831 (Ld. Brougham); *Freeman v. Phillipps*, 1816 (Ld. Ellenborough), cited with approbation (Ld.

Lyndhurst, C.B.) in *Davies v. Morgan*, 1831; *Nicholls v. Parker*, 1805; *Doe v. Tarver*, 1824 (Abbott, C.J.).

² Ante, §§ 610, 611.

³ Gr. Ev. § 132, in part.

amount of such fine, in which depositions the fine was mentioned as assessable by the lord, are plainly admissible as evidence to negative the existence of any custom for the jury to interfere.¹ As one of the learned judges observed in that case, "where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*."²

§ 633. It is not, however, necessary that the former controversy should have been between the same parties, or should have related to the same property or claim, provided it appears that the matters, respecting which the declarations offered in evidence on the second trial were made, were really under discussion in the former dispute. Consequently where in a peerage case the question before the Committee of Privileges respected the legitimacy of the claimant, and this turned on the fact whether his parents (who had certainly gone through the ceremony of a marriage after his birth, and had subsequently had several children) had been privately married two years before he was born;—a deposition of the father, wherein he swore positively to the fact of the first marriage, taken some years before, in a suit instituted by the claimant and three of his brothers born before the second marriage against the other children born after that event, for the purpose of perpetuating the testimony of the legitimacy of the former, who claimed in that character to be entitled in remainder to an estate then held by the father, was rejected.³ So, in another peerage case, where the claimant was required to prove that his parents were legally married, declarations contained in the will of one of the parents, affirming most solemnly the fact of marriage, as also statements to the same effect made by him in conversation, were rejected, since it appeared that some years previously to such declarations and statements being made, a suit had been instituted by the Crown to annul the marriage, and it was not shown (as in truth it could not be) that that marriage, then disputed, was not the very marriage relied on by the present claimant.⁴

¹ Freeman v. Philipps, 1816.

² Id. (Bayley, J.) See, also, Gee v. Ward, 1857; D. of Devonshire v. Neill, 1877 (Ir.) (Palles, C.B.).

³ Berkeley Peerage case, 1811 (JJ. in H. L.).

⁴ See Sussex Peerage Case, 1844, H. L., as reported 11 Cl. and Fin. 85, 99-103.

§ 634. Declarations, made after the controversy has originated, are in all events to be excluded, even though proof be offered that the *existence of the controversy was not known* to the declarant.¹ This is justified on the ground not only that whether the declarant knew of the existence of the previous litigation, raises a collateral issue, and that such prior litigation may have been instituted fraudulently, but on the further ground that, "If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced."²

¹ *Shedden v. Att.-Gen. and Patrick*, 1861.

² *Berkeley Peer.*, 1811 (Sir J. Mansfield, in H. L.).

AMERICAN NOTES.

Matters of Public and General Interest. — An interesting survival of a period when jurymen were members of the community selected for special personal knowledge of matters of notoriety in their respective localities is found in the exception to the hearsay rule which admits the reported statements of deceased persons, if properly qualified, concerning matters of public and general interest when such statements are made *ante litem motam*. *Lawrence v. Tennant*, 63 N. H. 532 (1888); *McCall v. U. S.* 1 Dak. 320 (1876).

Among such matters of public and general interest are clearly the boundaries of a state, territory or other large municipal division of territory for purposes of government.

On an indictment for murder at Deadwood, in the Black Hills, on the question of the locality of the homicide, evidence is competent that Deadwood is commonly reputed to be in the territory of Dakota. The court say: — "It may, therefore, be taken as settled that where the question is as to territorial limits, and where the boundary concerns the extent of a public municipal jurisdiction, (as whether lands lie, or rights are exercisable within its true limits), either public reputation, or the particular declarations of deceased persons, made *ante litem motam*, are receivable." *McCall v. U. S.* 1 Dak. 320 (1876).

So the position of a line separating two towns is a matter of public interest and the statements of deceased persons are competent though their declarations concern the position of a particular house as related to that line. *Abington v. North Bridgewater*, 23 Pick. 170, 174 (1839).

The location of a public highway may be proved as a matter of public and general interest by the statements of deceased persons properly qualified. *Lawrence v. Tennant*, 64 N. H. 532 (1888); 15 A. 543 (1888).

WHAT ARE NOT APPROPRIATE MATTERS. — The particular date at which an ancient school-house was built is not a matter of general interest. "The fallacy on the part of the defendants seems to be in assuming that because a school-house is a public building for a public purpose, the precise date of its erection must also be a matter of public or general interest to be proved by traditionary evidence; and therefore one of the defendants attempts, by repeating the unsworn statement of her deceased mother or grandmother as to a date, to change this public matter of a school-house into her own private property. . . . The law does not dispense with the sanction of an oath and the test of cross-examination as a prerequisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth.

The matters included in the class under consideration are such that many persons are deemed cognizant of them and interested in their truth, so that there is neither the ability nor the temptation to misrepresent that exists in other cases; and the matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination, while the persons whose declarations are offered in evidence must have been in a situation to know the truth. After passing such an ordeal it is reasonably safe to accept the result as established fact. But if the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guaranty for its correctness; so that the general rule excluding hearsay evidence applies in full force. The human memory is proverbially treacherous even in regard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate the date given with some more striking fact." S. W. School District of Bolton v. Williams, 48 Conn. 504 (1881).

Declarations of deceased persons are admissible in evidence regarding a private boundary when such boundary is coincident with a public boundary.

Such a case frequently arises in states once part of the public domain of the United States, where the meridian or range and section lines, though the bounds of private estates, are also of general interest to the community because serving as the boundaries of a large number of similar estates.

It is difficult to classify with precision the cases in which private boundaries may, by their coincidence with public boundaries, become provable as matters of general interest. As is said in *Curtis v. Aaronson*, 49 N. J. Law, 68 (1886).

"It may not, in every instance, be readily determinable whether a disputed boundary is of such public character as to permit evidence of reputation concerning it. In the case of lines of counties, towns, townships, highways, large water-courses, and the like, there can be no doubt. But there may be lines and monuments of a less marked public character, and yet, by reason of their relation to numerous minor titles and land divisions, a local public interest may arise, and a consequent knowledge in the neighborhood concerning them may be readily supposed to exist. Such cases it is believed come within the rule."

PRIVATE BOUNDARIES. — In matters of *private* boundaries, corners, &c., the declarations of deceased persons whether made *ante* or *post litem motam* are in most of the states regarded as incompetent. *Curtis v. Aaronson*, 49 N. J. Law, 68 (1886). In this case the court, in course of a well-considered opinion, lay down the fol-

lowing propositions. "In some of the American states the rule excluding hearsay testimony is, in this line of fact, to some extent departed from, and traditionary evidence is received to establish private boundary. It has been permitted, under color of making proof by ancient reputation, to give the declarations of third persons, strangers to the title, made when not engaged in any provable act, such declarations being recitals of past acts and doings of the declarant, or expression of opinion on matters exclusively pertaining to the rights of others. The reception of such evidence is confessedly in derogation of the established rules of evidence under our system, and is justified only on the ground of an alleged necessity.

It is needless to cite these cases, as they are fully referred to in the text-books in common use.

"But the decided weight of authority in the country, and upon the solid ground of reason and principle, is against the admissibility of evidence of this character."

The position of a corner in an ancient survey cannot be proved by the declarations of a deceased chain-carrier, though made while the latter was standing at or near the corner. "It was not merely hearsay, but hearsay not to matters of general reputation, or common interest among many, but to specific facts, viz. the manner and place of running the boundary lines of Remy's patent. The general rule is, that evidence, to be admissible, should be given under the sanction of an oath, legally administered; and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate, or interest with them. So it was laid down by Lord Kenyon, in his able opinion in the *King v. Eriswell*, 3 T. Rep. 721. Certain exceptions have, however, been allowed, which perhaps may be as old as the rule itself. But these exceptions stand upon peculiar grounds; and as was remarked by Lord Ellenborough in *Weeks v. Sparke*, 1 M. and Selw. 686, the admission of hearsay evidence, upon all occasions, whether in matters of public or private right, is somewhat of an anomaly. Hearsay is admitted in cases of pedigree; of prescriptive rights and customs; and of some other cases of a public or quasi public nature. In cases of pedigree, it is admitted upon the ground of necessity, or the great difficulty, and sometimes the impossibility of proving remote facts of this sort by living witnesses. But in these cases it is only admitted when the tradition comes from persons intimately connected, or in close relation with the family; or from sources of a kindred nature, which, in a general sense, may be said to import verity; there being no *lis mota* or other interest to affect the credit of their statement." *Ellicott v. Pearl*, 10 Pet. 412, 433 (1836). This decision was upheld in *Clement v. Packer*, 125 U. S. 309 (1887), on the sole ground that it was decided by the particular

rule existing in Kentucky, and no disposition to approve it is shown. A decision to the opposite effect seems to have been reached in *Boardman v. Lessees of Reed*, 6 Pet. 328, 341 (1832). "Landmarks are frequently formed of perishable materials, which pass away with the generation in which they are made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries: but such testimony must be pertinent, and material to the issue between the parties."

In certain states, moreover, "declarations of deceased persons who were disinterested at the time such declarations were made, in respect to boundary lines and corners of land, are competent to prove their location, if such persons had opportunity to be informed in respect thereto." *Bethea v. Byrd*, 95 N. C. 309 (1886). "It is true that such evidence is hearsay in its nature, but it has been deemed necessary to classify it with, and make it one of the exceptions to the general rule of law, that hearsay is not competent as evidence. Whether this exception comes strictly within the spirit and reason of the rule, may admit of some question, but however this may be, it is now, and has been for a long period, the law of this State. The reason of the exception seems to have been, and indeed, still is, the circumstances of the country, and the uncertainty, confusion, and indistinctness generally, of boundary lines and corners of tracts of land that belong to individuals. These and like considerations have rendered the exception necessary. Such evidence is not of a very high type, and may not ordinarily be very satisfactory, still, it is found that it subserves the ends of justice." *Bethea v. Byrd*, 95 N. C. 309 (1886); *Scoggin v. Dalrymple*, 7 Jones (N. C.) Law 46 (1859).

So in Pennsylvania. *Buchanan v. Moore*, 10 S. & R. 275 (1823); *Kramer v. Goodlander*, 98 Pa. St. 366 (1881); *Clement v. Packer*, 125 U. S. 309 (1887). In *Kennedy v. Lubold*, 88 Pa. St. 246, (1878), the declarations of a deceased surveyor thirty-five years before the trial as to the location of certain oaks and hickories as corner bounds, made while marking them, were admitted by the trial court as being weak evidence, hardly amounting to evidence, the ruling was held to be error. "These two cases were argued together. They seem to have been tried upon the doctrine of leaving first principles and going on to perfection. But old surveys are not to be so tested. Most perfect in the beginning they are constantly undergoing change and decay, until by wind, fire, rotteness, and the acts and frauds of men, their evidences lie only in memory and hearsay. Hence when the learned judge said of the acts of the surveyors, who forty years before went upon the ground, ran the lines, blocked the trees, counted the growths,

found original marks, and pronounced the hickory the numbered corner of donation lot No. 1260, it was mere hearsay, he hardly believed it evidence, admitted it with reluctance, and it was weak evidence in determining, he clearly misled the jury. The reverse is ~~true~~—the evidence was strong, and ought to prevail unless clearly rebutted, by showing either a mistake of the witness relating the facts, or error in the surveyors making the declaration that the hickory was the numbered corner and the white oak opposite an original corner. . . . The declarations as to the corners when found, blocked and counted, were a part of the *res gestæ*, and so far from being doubtful evidence were competent and always admitted when the transaction is old and the surveyor dead." *Kennedy v. Lubold*, 88 Pa. St. 246, 255 (1878).

So in Texas, of statements by deceased persons made to a surveyor pointing out to him posts upon the disputed boundary line as posts placed there by the surveyor who ran the original partition lines. "It is well settled by our decisions that the declarations of disinterested parties since deceased, who were in a position to know a boundary line, are admissible in a controversy about such line." *Tucker v. Smith*, 68 Tex. 473 (1887).

A dictum in New Hampshire is apparently to the effect that this class of evidence "is confined to monuments and lines and boundaries, but does not extend to acts of ownership, or possession, or to any other facts." *Wendell v. Abbott*, 45 N. H. 349 (1864). In the case itself a witness was permitted to testify as to what a deceased surveyor had told him about the corner of a private estate, but not as to the cutting of certain pine trees upon the disputed premises.

The rule is the same in Virginia. "Evidence is admissible to prove declarations as to the identity of a particular corner tree or boundary, made by a person who is dead, and had peculiar means of knowing the fact; as, for instance, the surveyor or chain carrier upon the original survey, or the owner of the tract, or of an adjoining tract calling for the same boundary; and so also tenants, processioners and others, whose duty or interest would lead them to diligent enquiry and accurate information as to the fact; always excluding those declarations which are liable to the suspicion of bias from interest." *Harriman v. Brown*, 8 Leigh, 697 (1837). This case is cited with approval in *Hill v. Proctor*, 10 W. Va. 59, 85 (1877).

The courts of Virginia do not, however, evidence an inclination to extend the doctrine laid down in *Harriman v. Brown* (*ubi supra*). They are "not disposed to extend it in the least beyond the very terms in which it is there expressed." *Clements v. Kyles*, 13 Gratt. 468 (1856). So where the deceased declarant lived on the premises in dispute, but was neither a chain-carrier or surveyor at

the time of the original survey, nor owner of the tract or any adjoining tract calling for the same boundaries, his evidence was rejected. "That his living within the bounds of the survey gave him the opportunity to see trees marked as corners of some survey, found accidentally or otherwise, would surely not be sufficient unless some duty or interest can be traced to him by which he would have been prompted to make diligent enquiry and to obtain accurate information within the meaning of the rule as propounded in *Harriman v. Brown*." *Clements v. Kyles*, 13 Gratt. 468, 479 (1856).

The rule in South Carolina is very similar. *Speer v. Coate*, 3 McCord, 227 (1825).

"How often have we known reputed boundaries, proved by the testimony of aged witnesses, and even by the hearsay evidence of such witnesses, established in opposition to the most precise calls of an ancient patent. Such evidence has been constantly received, and distances have been lengthened or shortened, without the slightest regard to the calls of the patent. The reason is obvious. It is not the lines reported, but the lines actually run, by the surveyor, which vests in the patentee a title to the area included within these lines. The survey returned, or the patent, is the evidence of the former; natural marks or reputation is in almost all cases the evidence of the latter. The mistakes committed by surveyors and chain carriers, more particularly in an unsettled country and wilderness, have been so common, and are so generally acknowledged, as to have given rise to a principle of law, as well settled as any which enters into the land titles of this country, which is, that, when the mistake is shown by satisfactory proof, courts of law, as well as courts of equity, have looked beyond the patent to correct it. It will be readily admitted, that such evidence should be cautiously received, if it should have a preponderating influence in determining the question of boundary." *Conn. v. Penn.*, 1 Pet. C. Ct. 496, 511 (1818).

THE MASSACHUSETTS RULE. — In Massachusetts, the rule as to declarations of deceased persons regarding private boundaries has been largely affected by what Professor Greenleaf has called "the principle of the *res gestæ*;" — a thing difficult to understand. Declarations of a deceased owner of land as to his boundaries, corners, &c., made while in possession of such land, and in the act of pointing out his own boundaries, are admissible as evidence of these facts, provided no interest to misrepresent at the time existed. *Daggett v. Shaw*, 5 Metc. 223 (1842); *Holmes v. Turner's Falls Co.* 150 Mass. 535 (1890).

If the declarant was not at the time, and never had been, the owner of the premises or in possession as tenant or otherwise, his declarations are inadmissible. *Bartlett v. Emerson*, 7 Gray, 174

(1856). If the declarant had occupied the premises in question, but had ceased to do so at the time of the declaration, it is also incompetent. *Whitney v. Bacon*, 9 Gray, 206 (1857).

If not made while in the act of pointing out the boundaries of the declarant's land, the declarations are incompetent. "This is an element which cannot be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it accompanies an act which it qualifies or gives character to. The declaration is then a part of the act. Without such accompanying act, the declaration is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail against hearsay evidence." *Long v. Colton*, 116 Mass. 414 (1875).

It is essential that the declarant should be deceased. If he is alive and could be called as a witness, the declaration cannot be received. *Flagg v. Mason*, 8 Gray, 556 (1857).

The admissibility is limited to the fact and location of the boundary; the declaration is not evidence of particular facts mentioned at the same time. "Any further declaration of a fact material to the issue, would have been an attempt to prove such fact by hearsay evidence, and so contrary to the rule. Had the deceased been requested to go and point out the line, and he had done it without any declaration whatever, it would have been an act of the same character and admissible upon the same principle." *Van Deusen v. Turner*, 12 Pick. 532 (1832).

It is not an objection to the competency of this evidence that the statements of the deceased declarant were in favor of himself.

"It is undoubtedly true, as an established principle of the law of evidence, that hearsay testimony cannot be received; and the wisdom of the principle is confirmed by the uniformity of the decisions in various courts and in different countries, which enforce it; but, like very many general rules, it is not without its exceptions. One of these is traditional evidence or hearsay testimony of ancient witnesses respecting boundaries. In regard to this exception, many authorities have been cited by the counsel for the demandant, to prove that these declarations are only to be received as admissions of a party in possession, when made against his interest. But we think the rule, as it has been practised upon in this Commonwealth, is not so restricted; and that the declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights." *Daggett v. Shaw*, 5 Metc. 223 (1842).

RULE REGARDED AS ANOMALOUS. — The supreme judicial court of Massachusetts evince no inclination to extend the anomaly further than at present carried. They have accordingly declined, on a case for the conversion of the waters of a spring, to sustain the admission of a declaration by a deceased owner, that he called a certain stream a "spring" and intended to carry it off the land. The reason given is this:—"Such declarations have generally been regarded as an exception to the general rule against hearsay, and that we cannot extend the principle further than it has been carried by authority. We are not aware that it has ever been applied to a case like this." *Peck v. Clark*, 142 Mass. 436 (1886).

MASSACHUSETTS RULE FOLLOWED. — With various modifications the "Massachusetts rule" has been followed in other states,—for example, in the federal courts. "They (declarations of a particular fact respecting a private boundary) are, therefore, receivable only when made coincidentally with pointing out the boundaries and generally as part of the *res gestæ*." *Hunnicutt v. Peyton*, 102 U. S. 333, 363 (1880).

So in Vermont. *Child v. Kingsbury*, 46 Vt. 47 (1873).

And in New Jersey. "Proof of declarations of persons since deceased, in respect to private boundaries, to be admissible in evidence, must have been made by a declarant in possession as owner at the time, and while engaged in pointing out the boundary in question, and such declarations need not be against interest or in disparagement of title; they are received when nothing appears to show an interest to deceive or misrepresent." *Curtis v. Aaronson*, 49 N. J. L. 68, 77 (1886).

And in Maine. *Royal v. Chandler*, 83 Me. 150 (1891). "We think this rule has been recognized and acted upon in cases like this in this state. It is an exception to the general rule of evidence, that hearsay evidence is incompetent. Landmarks in the early surveys are usually formed of perishable materials, frequently destroyed in clearing and the improvement of the land, and pass away with the generation in which they were made. In such cases, when no direct proof can be made as to the location and character of the monuments, we are forced to secondary evidence; and the acts of the owner of the land when upon it, pointing out the monuments and location of his line, and his declarations, made at the time in regard to them, when no controversy exists, are competent to be submitted to the jury, after his death, as having some tendency to prove the location of the line."

In New Hampshire the declarations of a deceased owner of land as to his boundaries are admissible even if not made while in the act of pointing out his bounds. "Two things are necessary in order to make the declarations of deceased persons competent evidence as to boundaries. 1st. It must appear that the deceased party, or

declarant had knowledge. 2d. He must have no interest to misrepresent. . . . It is a general presumption that owners of land know their boundaries, but sometimes they do not, and when they are ignorant of them, of course their statements in relation to them, whether made on, or off their land are of but little or no consequence, but when such boundaries are clearly known, or established by those in interest, then they generally can communicate accurate knowledge, whether their statements be made at the boundary or at a distance from it." *Smith v. Forrest*, 49 N. H. 230 (1870); *Lawrence v. Tennant*, 64 N. H. 532 (1888).

Such declarations may of course be admissible strictly as part of a *res gestæ* fact. For example, where the fact that a deceased proprietor of land had built a fence on his land was a competent fact, the intention with which he placed it in a certain position, as shown by his declaration when building it, is competent. *Quinn v. Eagleston*, 108 Ill. 248 (1883).

DECLARANT MUST BE DEAD. — Such is the original rule. *Bethea v. Byrd*, 95 N. C. 309 (1886); *Tucker v. Smith*, 68 Tex. 473 (1887).

So, in case of the peculiar rule in Massachusetts above referred to, as to declarations relating to private boundaries, it is an insuperable objection if the declarant is not shown to be dead. *Flagg v. Mason*, 8 Gray, 556 (1857).

ANTE LITEM MOTAM. — The declaration must be made before any controversy has arisen concerning the subject-matter of the declaration. *Bethea v. Byrd*, 95 N. C. 309 (1886).

If made *post litem motam*, they are excluded unless prior similar statements were made *ante litem motam*. *Speer v. Coate*, 3 McCord, 227 (1825).

MUST BE DISINTERESTED. — It has frequently been deemed necessary that the declarant should be personally disinterested. *Bethea v. Byrd*, 95 N. C. 309 (1886); *Tucker v. Smith*, 68 Tex. 473 (1887).

This phrase has been interpreted in Vermont to require that there should be no object to misrepresent. Thus, in admitting evidence of declarations of a deceased proprietor as to a private boundary, the court say: — "The case does show that these persons had been interested in this boundary before they made the declarations, and perhaps it shows enough so that it may fairly be claimed that they were so interested at the time they were shown to have stated in regard to it. But however this may be, the case does not show that they were interested to misrepresent in regard to what they said about it. It does not appear that any one was claiming to so locate the boundary as to restrict the land of either, nor that either was so situated as to desire to have it located anywhere but

in its true place, nor that in anything either said, he was speaking in subserviency to any wish on his part to maintain any one particular location of the line over another. There are cases, it is true, that would exclude such declarations as these, although they would admit those of deceased persons disinterested in every respect." *Child v. Kingsbury*, 46 Vt. 47, 53 (1873).

REPUTATION. — That the hearsay as to matters of public and general interest has taken the form of reputation does not materially affect the rule.

The incorporation of a parish may be shown by reputation. "It is a well known fact that by two several fires in the town of Boston a great part of the public records of the late province were burnt: and unless the existence of a corporation could be proved by reputation, many towns and parishes would lose all their corporate rights and privileges. *Dillingham v. Snow*, 5 Mass. 547 (1809). The existence of a reputation concerning ancient public boundaries is admissible as proof of the location of the boundary. *Hunnicut v. Peyton*, 102 U. S. 333, 363 (1880).

"Nor is it denied that in Virginia not only general reputation, but also hearsay evidence as to particular facts, may under certain circumstances be properly received as evidence." *Clements v. Kyles*, 13 Gratt. 468, 477 (1856).

The location of a county boundary may be proved by reputation, and the rule is the same in civil and in criminal cases. *Cox v. State*, 41 Tex. 1 (1874).

So the location of a highway may be established by reputation. "Proof of general reputation was admissible in this case, for the purpose of showing the existence and extent of the highway in question." *Noyes v. Ward*, 19 Conn. 250, 269 (1848); *Jaquith v. Scott*, 63 N. H. 5 (1883.) "Ancient reputation and possession in respect to the boundaries of the streets, are entitled to infinitely more respect, in deciding upon the boundaries of the lots, than any experimental survey that can now be made. If not, the whole city, and all other towns, would be thrown into the utmost confusion." *Ralston v. Miller*, 3 Rand. (Va.) 44 (1824).

"Reputation as to the existence of particular facts not of a public nature, is not generally admissible, though, where the existence of the facts has been proved *aliunde*, reputation is sometimes received to explain them." *Shutte v. Thompson*, 15 Wall. 151 (1872). Therefore a refusal to allow proof of the reputation of the neighborhood as to a poplar corner at the then present time, "unless such reputation was traditionary in its character, having passed down from those who were acquainted with the reputation of the tree from an early day to the present time," or unless 'the information as to such reputation was derived from ancient sources,

or from persons who had peculiar means of knowing what the reputation of the tree was at an early day ' ' ' was held to be "fully sustained by authority." *Ibid.* But the court permitted evidence that the occupants of the estates adjoining the poplar corner had "claimed the poplar as the true corner of their tracts." *Ibid.*

In Texas, general reputation has been allowed to prove the location of ancient private boundaries. "These boundaries were ancient, and their locality seems to have been a matter of sufficient interest in the neighborhood to have been the subject of observation and conversation among the people. The witness stated the reputation to have been general, and it clearly appeared that it was formed before this controversy was begun." *Clark v. Hills*, 67 Tex. 141, 152 (1886).

See also a dictum in Connecticut. *Kinney v. Farnsworth*, 17 Conn. 355 (1845).

"From the nature of the thing, an old boundary cannot, in general, be proved by direct and positive proof; and reputation is therefore, from necessity, admissible." *Smith v. Nowells*, 2 Litt. (Ky.) 159 (1822). "Pedigree and boundary are the excepted cases, wherein reputation and hearsay of deceased persons are received as evidence. The statements of deceased persons relative to boundaries of which they spoke from actual personal knowledge, have been frequently received in evidence in this state." *McCausland v. Fleming*, 63 Pa. St. 36 (1869).

So in Florida. "There is no error in the ruling that although some portion of the evidence respecting the boundaries of these grants is mere reputation or hearsay, yet such evidence, taken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks or other evidence than that of hearsay." *Daggett v. Willey*, 6 Fla. 482, 510 (1855).

"A surveyor is an expert, and he may state the facts on which he bases his opinion, that a line run or surveyed by himself has been correctly done. He may state that he 'found the corner stake' of a public survey, and 'the bearing points, and the marked trees along a line' of such survey. These are facts, which are competent and relevant, when the fact to be proven is the accuracy of a boundary line of adjacent tracts of lands. See *Nolin v. Parmer*, 21 Ala. 66.

"When the proofs tend to show that it is uncertain upon which of two parcels of land, separated by a section line, a trespass has been committed, the admissions of the adverse party to the suit, who is the owner of the lands on one side of the line, that the line of separation is in a certain place, may be permitted to go to the jury,

to show the truth of the fact thus admitted. Boundary may be proven by reputation and hearsay. It may be shown in this way whether land is parcel or not parcel of a certain tract of land. *Boardman v. Reed's Lessees*, 6 Peters, 341; also, 1 Phil. Ev. (C. & H. Ed. Notes) pp. 218, 219 et seq." *Shook v. Pate*, 50 Ala. 91 (1873).

CHAPTER IV.

MATTERS OF PEDIGREE.

§ 635. It has been pointed out¹ that while, as a general rule, hearsay evidence is not admitted, there are *six* exceptions to this general rule. Evidence as to matters of pedigree forms the *second* exception to such general rule. This exception rests on the ground of necessity. For example, in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known but to few persons. Courts of law, have, consequently, so far relaxed these rules in matters of pedigree,² as to allow parties to have recourse to traditional evidence; often the sole species of proof which can be obtained. The Probate Division will even grant probate to the estate of a person whose Christian name is not known, but who is proved by admissible declarations of members of the family to have had an existence.³ It was, indeed, long doubtful whether the declarations of servants, friends, and neighbours, might not be received. But the settled rule is that the admission of hearsay is restricted to hearsay proceeding from persons who were *de jure related by blood or marriage* to the family in question, and who may, consequently, be supposed to have had the greatest interest in seeking, the best opportunity for obtaining, and the least reason for falsifying, information on the subject.⁴

¹ Ante, § 607.

² As to the burthen of proof in matters of pedigree, see *In re Per-ton*, *Pearson v. Att.-Gen.*, 1885 (*Chitty, J.*).

³ *Re Goods of Thompson*, 1887.

⁴ *Johnson v. Lawson*, 1824; *Crease v. Barrett*, 1835; *Vowles v. Young*, 1806 (*Ld. Erskine*); *Goodright v.*

Moss, 1777 (*Ld. Mansfield*), as explained by *Ld. Eldon* in *Whitelocke v. Baker*, 1807; *Monkton v. Att.-Gen.*, 1831 (*Ld. Brougham*); *Stafford Peer.*, 1825, *H. L.*; *Jewell v. Jewell*, 1843 (*Am.*); *Jackson v. Browner*, 1820 (*Am.*); *Chapman v. Chapman*, 1817 (*Am.*); *Waldron v. Tuttle*, 1828 (*Am.*).

§ 636. So far as blood relations are concerned, no limitation in the rule has ever been recognised.¹ And with regard to relationship by affinity, not only are declarations by a husband respecting his wife's family² admissible, but so also are now the wife's declarations concerning her husband's relatives.³ But statements made by the wife's *relatives*—even, for instance, her father—are not.⁴ Moreover, the rule does not apply at all as between *illegitimate* members of a family. Therefore, an assertion by a man that one of his natural brothers had died without issue must be rejected;⁵ as also must a declaration by one brother that another brother has had an illegitimate son.⁶

§ 637. Whether, under any circumstances, the declarations of a person deceased, asserting his own illegitimacy, can be received is doubtful. Such declarations, however, can always be received as admissions against himself and those who claim under him by some title derived subsequently to the statements being made.⁷ Declarations of a parent that a child is illegitimate are

¹ *Davies v. Lowndes*, 1843 (Parke, B.); *Shrewsbury Peer.*, 1857, H. L. (Ld. Wensleydale).

² Overruling dictum in *Davies v. Lowndes*, 1843 (Parke, B.).

³ *Shrewsbury Peer.*, 1857, H. L.

⁴ *Id.*

⁵ *Doe v. Barton*, 1827 (Patteson, J.). See *Doe v. Davies*, 1847.

⁶ *Crispin v. Doglioni*, 1863. See, however, *contra*, *Cooke v. Lloyd*, 1803, *infra*, in note ⁷. See, also, *Hitchins v. Eardley*, 1871.

⁷ See *R. v. Rishworth*, 1842 (Wightman, J.); and *Proc.-Gen. v. Williams*, 1861 (Sir C. Cresswell); *S. C. nom. Dyke v. Williams*, 1861; *In re Mary Emsley*, 1862. In *Cooke v. Lloyd*, 1803 (Le Blanc, J.), the question was whether an elder son, who had taken possession of the paternal estates, and conveyed them to one of the litigants, was born in wedlock. After such elder son's death, his own declaration that he was a bastard was received in evidence (Le Blanc, J.), though made subsequently to the conveyance, "as the representation of one of the family of the degree of relationship he bore to it." If the cases cited in the text

be law,—as they would probably be deemed at the present day,—this decision can scarcely rest upon that ground, unless the special circumstances of the case be prayed in aid; and unless it can successfully be contended, that, since the defendant's claim rested on the legitimacy of the vendor, he could not object to the vendor's declaration, without relinquishing the only prop of his title. Should this refined argument be deemed inconclusive, perhaps the admissibility of the declaration might be sustained, on the ground that the cause turned, not only on the condition of the father's family, but on the actual status of the declarant himself; but here we are met by the difficulty, that the son could only have known the fact of his own illegitimacy by information received from others; and, as a bastard has in the eye of the law no relatives, the hearsay must have been derived from strangers, and its admissibility might on that ground be questioned. See further remarks on this case, *infra*, in text. Moreover, in one case evidence was received that the father had

admissible after such parent's death,¹ notwithstanding the rule of law, which possibly still² precludes parents from giving testimony to bastardise issue born during wedlock.³ Possibly, however, after previous proof of a valid marriage they are inadmissible.⁴

§ 638. If a man has once been connected with a family by marriage, the death of his wife will not dissolve that connexion, so as to render inadmissible declarations subsequently made by him. Therefore where, in a case of pedigree, a witness was asked whether he had not heard a husband, since deceased, state, after his wife's death, that she was illegitimate, the answer was received.⁵ The court *presumed* that the knowledge must have been obtained by the husband whilst he was a member of the family.⁶

§ 639. Again, no valid objection can be taken to evidence of tradition as to family history, on the ground that it is *hearsay upon hearsay*, provided all the declarations come from different members of the same family, or do not directly appear to have been derived from strangers.⁷ For example, the declarations of a deceased widow respecting a statement which her husband had made to her, as to who his cousins were, or the declaration of a relative, in which he asserts generally that he has *heard* what he states, are both receivable; and even *general repute in the family*, proved by the testimony of a surviving member of it, has been considered as falling within the rule.⁸ Moreover, it is not necessary to show

specified the time of his marriage, had declared his eldest son to have been born before that date, had heaped upon him opprobrious epithets implying illegitimacy, and had on his death-bed pointed to his younger son as his heir; and these declarations would seem to have been clearly admissible, if not as directly proving the bastardy of a person, who, though *de facto* his son, was *de jure* a stranger to him, at least as showing the position of the legitimate portion of his family, through whom the plaintiff claimed his title. See *Goodright v. Moss*, 1777 (Ld. Mansfield); *Murray v. Milner*, 1879 (Fry, J.). See, also, *In re Perton*, Pearson v. Att.-Gen., 1885 (Chitty, J.).

¹ See *In re Perton*, Pearson v. Att.-Gen., 1885; *Aylesford Peer.*, 1885, H. L.

² See post, § 950.

³ *R. v. Stourton*, 1836.

⁴ *Murray v. Milner*, 1879, *supra* (Fry, J.).

⁵ *Vowles v. Young*, 1806 (Ld. Erskine); *Doe v. Harvey*, 1825 (Little-
dale, J.). But see observations in last section.

⁶ *Johnson v. Lawson*, 1824 (Burrough, J.).

⁷ *Shedden v. Att.-Gen. and Patrick*, 1861.

⁸ *Doe v. Griffin*, 1812; *Shedden v. Att.-Gen. and Patrick*, 1861. If this were not so, the main object of relaxing the ordinary rules of evidence would be frustrated, since it seldom happens that the declarations of deceased relatives embrace matters within their own personal knowledge: *Doe v. Randall*, 1828; *Monkton v. Att.-Gen.*, 1831 (Ld. Brougham);

that the declarations were contemporaneous with the events to which they relate.¹

§ 640. Before, however, a declaration can be admitted in evidence, the *relationship of the declarant with the family must be established* by some proof *other than the declaration itself*.² In tracing ancient pedigrees, the court would probably be satisfied with slight evidence on this head, since the connexion of the declarant with the family might be equally difficult of proof with the very fact in controversy. But some evidence would certainly be required even here. Otherwise, a stranger, by claiming alliance with a family, and then making statements respecting it, might assume to himself the power, after death, of materially altering the relative rights of its several branches.³ It seems, however, unnecessary to show the exact degree of relationship that subsists between the declarant and the person respecting whom the declarations are tendered, but it will be sufficient to prove that they were in some manner connected by blood or marriage;⁴ and if the question be whether any, or what, relationship subsists between two supposed branches of the same family, it is only necessary to establish the connexion of the declarant with either branch.⁵ It has, indeed, been urged, that proof must be given connecting the declarant with both branches; but if this were necessary the declarations would be superfluous, as merely tending to prove a connexion, which, by proof showing that the declarant was related to both branches, had already been established.⁶

Slaney v. Wade, 1836. See *Robson v. Att.-Gen.*, 1843, H. L., and *Davies v. Lowndes*, 1843. See post, §§ 655, 656.

¹ *Monkton v. Att.-Gen.*, 1831; *Lovatt Peerage*, 1826—57, H. L. As *Ld. Brougham* has well observed, such a restriction "would defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence;" and, to use a homely illustration,—it would even render inadmissible the statement of a deceased person as to the maiden name of his own grandmother.

² *Monkton v. Att.-Gen.*, 1831; *Banbury Peer.*, 1809, H. L.; *Ld. Eldon in Berkeley Peer.*, 1811, H. L.; *Leigh Peer.*, 1828—29, H. L.; *Stafford Peer.*, 1825, H. L.; *R. v. All Saints*, 1828 (*Bayley, J.*); *Davies v. Morgan*, 1831 (*Id.*); *Att.-Gen. v. Köhler*, 1861, H. L.; *Plant v. Taylor*, 1861; *Dyke v. Williams*, 1861; *In re Mary Emsley*, 1862.

³ See *Doe v. Randall*, 1828 (*Best, C. J.*).

⁴ See *Vowles v. Young*, 1806.

⁵ *Monkton v. Att.-Gen.*, 1831 (*Ld. Brougham*). See *Smith v. Tebbitt*, 1867.

⁶ *Monkton v. Att.-Gen.*, 1831 (*Ld. Brougham*).

§ 641. Though the ground upon which hearsay evidence is admitted in cases of pedigree is, technically, because it is presumed that no better evidence can be procured, yet such evidence will not be rejected, though living witnesses might have been called to prove the very facts to which it relates.¹ For example, the declarations of a deceased mother, as to the time of the birth of her son, may be received, though the father be living and not called.² Where, however, the declarant himself is alive, and capable of being examined, his declarations will be rejected.³ Consequently, it lies upon the party, who seeks to avail himself of this species of evidence, to prove the declarant's death. Thus, where, to establish a Scotch marriage, a relative of the supposed husband had been asked at the trial what she had heard on the subject from "members of the family," the answer was rejected, on the ground that the question had not been limited to statements made by *deceased* relatives.⁴ Moreover, as pointed out in the last chapter, even in matters of pedigree, hearsay declarations made *post litem motam* are not receivable.⁵

§ 642.⁶ The term *pedigree* embraces not only general questions of descent and relationship, but also the particular facts of *birth*, *marriage*, and *death*, and the *times*⁷ when, either absolutely or relatively, these events happened, provided such facts are required to be proved for some genealogical purpose.⁸ All these facts, therefore, may, in any genealogical inquiry, be established by hearsay derived from relatives, though, with respect to specific dates, some doubts have been entertained as to the extent and application of the rule.⁹ The high authorities cited in the footnote¹⁰

¹ Ph. Ev. 212.

² R. v. Birmingham (undated).

³ Pendrell v. Pendrell, 1731.

⁴ Butler v. Mountgarret, 1859, H. L.

⁵ Ante, §§ 628—634; Butler v. Mountgarret, 1859, H. L.

⁶ Gr. Ev. § 104, as to first four lines, in part.

⁷ Betty v. Nail, 1856 (Ir.).

⁸ As to this proviso, see post, § 645.

⁹ Tindal, C.J., rejected the declarations of deceased persons, tendered to prove the ages of their relatives,

on the ground that, though admissible for the purpose of showing the relationship, they could not be received as proof of particular facts, such as the ages of parties. Lord Brougham, however, on a motion for a new trial, intimated a very strong opinion in favour of the admissibility of the evidence, and subsequently stated that Parke and Littledale, JJ., entirely concurred in this view: *Kidney v. Cockburn*, 1831.

¹⁰ *Herbert v. Tuckal*, 1663; recognized by Lord Ellenborough, in *Roe v. Rawlings*, 1806; case

and the general practice of the profession, appear, however, to show that these doubts are groundless.

§ 643. Hearsay evidence of particular facts being inadmissible in support of public rights,¹ it may be urged that such evidence ought to be also inadmissible upon questions of pedigree. But, "on cases of general right, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; and the family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."²

§ 644. Still, hearsay evidence must, when given as to pedigree, be *confined to such facts as are immediately connected with the question of pedigree*; and declarations as to independent facts, from which the date of a genealogical event may be inferred, will probably be rejected. The following examples will explain the extent and operation of this rule. In a question of legitimacy, turning upon the time of birth, a declaration by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, when coupled with proof of the time when her, the witness',

cited in 1 Ph. Ev. 214, from Vin. Ab. Ev. T. b. 91, 1731; Vulliamy v. Huskisson, 1838 (Ld. Abinger); Ryder v. Malbone, 1831, cited 2 Russ. & Myl. 169, as a decision by Little-dale, J. Ld. Mansfield, in Goodright v. Moss, 1777; Lord Brougham, in Monkton v. Att.-Gen., 1831;

K. Bruce, V.-C., in Shields v. Boucher, 1847; Pollock, C.B., in Plant v. Taylor, 1861; 1 Ph. Ev. 213; Hubb. Ev. of Suc. 649; 3 St. Ev. 841.

¹ Ante, § 617.

² Sir J. Mansfield in Berkeley Peerage case, 1811, H. L.

own child was born, tended to fix the alleged bastard's birth at a period subsequent to its parent's marriage, but its admissibility is doubtful;¹ in a case,² turning on the relative seniority of three sons, born at a birth, declarations by the father that he had christened them Stephanus, Fortunatus, and Achaicus, according to the order of the names in St. Paul's First Epistle to the Corinthians,³ for the purpose of distinguishing their seniority, and also declarations by an aunt, who, at the confinement, with a similar object, had tied strings round the arms of the second and third child, were, however, admitted. In the former case, the fact of suckling the child had no direct bearing on its age or legitimacy, but was only a species of circumstantial evidence from which these facts might be inferred; whilst in the latter, the christening and the tying strings round the arms of the children were intended from the first to afford the means of ascertaining their relative seniority.⁴

§ 645. Mr. Phillipps justly observes that, "there appears to be no foundation for any distinction between cases where a matter of pedigree is the direct subject of the suit, and other cases where it occurs incidentally."⁵ The declarations of relatives are, nevertheless, only admissible in cases which directly or indirectly involve some question of relationship, and the fact sought to be established by hearsay is required to be proved for some *genealogical* purpose;⁶ they will not necessarily be admissible when the date, place, or other facts connected with the birth, marriage or death of a party is the subject of controversy. Consequently, in an action for use and occupation by a reversioner against a tenant *pour autre vie*, who has held over after the death of the *cestui que vie*, the latter's death must be proved in the ordinary way, and the hearsay of relatives will be inadmissible;⁷ while letters written by the deceased father of the defendant cannot be read in support of a defence of infancy;⁸

¹ Isaac v. Gompertz, 1837. Gurney, B., admitted this evidence, but Lord Cottenham expressed an opinion that he was wrong in so doing.

² Vin. Ab., Ev. T. b. 91; probably referred to as Spadwell v. —, 1731, by Lawrence, J., in the Berkeley Peer., 1811, H. L.

³ Ch. 16, v. 17.

⁴ See, further, on this subject, Palmer v. Palmer, 1885 (Ir.); the

Lovat Peerage case, 1885, H. L.

⁵ 1 Ph. Ev. 216, n. 5.

⁶ Shields v. Boucher, 1847 (K. Bruce, V.-C.). See Smith v. Smith, 1876 (Ir.).

⁷ Whittuck v. Waters, 1830 (Park, J.).

⁸ Figg v. Wedderburne, 1842 (Paterson, J.). See, also, Haines v. Guthrie, 1884, C. A.

where several sons are entitled to an estate in order of seniority, in an action of ejectment for it by a younger son, family tradition is not admissible to prove the death of an elder;¹ and in a settlement case,² the declarations of a deceased father as to the place where his child was born, cannot be received as evidence of the birth settlement of the child.³

§ 646. The settlement case just referred to⁴ does not, however (as has sometimes been supposed), establish that in a strict question of pedigree, hearsay evidence of *locality*,—or, in other words, the declarations of deceased persons respecting the *places* where their relatives were born, and where they married, resided, came from, went to, or died,—cannot be received.⁵ And hearsay evidence of locality has, indeed, on several occasions been admitted to elucidate matters of strict pedigree.

§ 647. For example, where the question was, whether A. B., an ancestor of the declarant C., was the same person as A. B., a blacksmith, who had resided at X., a declaration by C. that his ancestor was a blacksmith, and that he resided at X., was received in evidence.⁶ If it be necessary to show that a family had relations who lived at a particular place, declarations by a deceased member of the family, that “he was going to visit his relatives at that place,” will be evidence; not, indeed, that he went there, or that any person of his name lived in that neighbourhood; but as proving a tradition in the family, that they once had relations living in the place in question, which tradition, in the event of its being shown by other evidence that persons of the same name had resided there, might be important as a mode of identifying those

¹ *Palmer v. Palmer*, 1885 (Ir.).

² *R. v. Erith*, 1807. In this case the child was a bastard, and the declarations of his putative father would therefore have been inadmissible even on a question of pedigree; but this point was not raised. See ante, §§ 636, 637.

³ Strenuous unsuccessful efforts were formerly made to render the declarations of deceased persons admissible in proof of particulars respecting their settlements. See *R. v. Eriswell*, 1790; *R. v. Chadderton*, 1801; *R. v. Ferry Frystone*, 1801; *R. v. Abergwilly*, 1801.

⁴ *R. v. Erith*, 1807.

⁵ See *Shields v. Boucher*, 1847, where Knight Bruce, V.-C., intimated a strong opinion that such evidence was admissible, and observed that in *R. v. Erith*, 1807, Lord Ellenborough carefully rested the judgment on the fact that no question whatsoever of relationship was involved in the inquiry. So that, in the opinion of the V.-C., if the evidence tendered in that case had been required for any genealogical purpose, a different conclusion might very possibly have been arrived at.

⁶ *Hood v. Lady Beauchamp*, 1836 (*Shadwell*, V.-C.).

persons with the branch of the family alluded to;¹ and evidence has also been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant.²

§ 648. The *forms* under which hearsay evidence in matters of pedigree may be presented are very numerous. Letters written under dictation from, and in the name of, a deceased person, are regarded as declarations by such deceased person,³ and all oral declarations by a deceased *relative* are clearly admissible if made *ante litem motam*.⁴ But declarations by deceased relatives, however made, are rarely deserving of much weight;⁵ for not only are they usually sought to be established by persons interested in the litigation, but they are often recorded or remembered for the first time after the contest has arisen. The court, therefore, necessarily runs considerable risk of being deceived by deliberate falsehood, and the more so as it is obviously difficult, not to say impossible, to convict a witness of perjury in narrating what he alleges that he heard in a conversation with a deceased person.⁶ Even assuming that the sincerity of the witness cannot reasonably be doubted, men are often, without deliberately intending to falsify facts, extremely prone to believe what they wish, to confound what they believe with what they have heard, and to ascribe to memory what is merely imagination.⁷

§ 649.⁸ *Family conduct*, too—such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which the opinion and belief of the family may be inferred, and as resting ultimately on the same basis as evidence of family tradition. For example, “if

¹ *Rishton v. Nesbitt*, 1844 (Rolfe, B.).

² *Id.*, citing *Monkton v. Att.-Gen.*, 1831. Knight Bruce, V.-C., in a very elaborate judgment in *Shields v. Boucher*, 1847, intimated a strong opinion, that, in a controversy merely genealogical, declarations made by a deceased person as to where he or his family came from, “of what place” his father was designated, and what occupation his father followed, would be admissible, and might be most material evidence for the purpose of

identifying and individualising the person and family under discussion.

³ *In re Turner*, *Glenister v. Harding*, 1885.

⁴ See ante, § 644; *Lovat Peerage case*, 1885, H. L.; *In re Porter*, *Pearson v. Att.-Gen.*, 1885.

⁵ See *e. g.*, the *Lovat Peerage case*, 1885, H. L.

⁶ *Crouch v. Hooper*, 1852 (Romilly, M.R.); *Webb v. Haycock*, 1854 (*id.*).

⁷ *Crouch v. Hooper*, 1852 (Romilly, M.R.).

⁸ *Gr. Ev.* § 106, in part.

the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.”¹ On the other hand, the concealment of the birth of a child from the husband,²—the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognised in the family as the legitimate offspring of the husband,—are all circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favour of the issue of a married woman.³ Again, on a question whether a person, from whom the claimant shows descent, was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will, but that no notice is taken of such person, is strong evidence to show, either that such person was not the son of the testator, or at least that he had died without issue before the date of the will.⁴ The production, too, of a man’s will, in which no notice is taken of his family, and by which his property is bequeathed to strangers or collateral relations, is cogent evidence of his having died childless.⁵

§ 650.⁶ *Entries made by a parent or relation in bibles,*⁷ prayer-books,⁸ missals,⁹ almanacs,¹⁰ or indeed in any other book, or in any document or paper,¹¹ stating the fact and date of the birth, marriage,¹² or death of a child, or other relation, are also evidence, in pedigree cases, as being written declarations of the deceased persons who respectively made them. Entries in a family bible or testament will be admissible, even without proof that they have

¹ Berkeley Peerage case, 1811 (Sir J. Mansfield), H. L.

² Hargrave v. Hargrave, 1848.

³ Goodright v. Saul, 1791 (Ashurst, J.); Morris v. Davies, 1836-7, H. L.; Banbury Peer., 1811, H. L.; R. v. Mansfield, 1841; Townshend Peer., 1843, H. L.; Atchley v. Sprigg, 1864.

⁴ Tracy Peer., 1843 (Ld. Campbell), H. L.; Robson v. Att.-Gen., 1843 (Ld. Cottenham), H. L. See ante, § 620, ad fin.

⁵ Hungate v. Gascoigne, 1846; De Roos Peer., 1804-5, H. L.

⁶ Gr. Ev. § 104, in part.

⁷ Berkeley Peer., 1811, H. L.

⁸ Leigh Peer., 1828, H. L.

⁹ Slane Peer., 1855, H. L.

¹⁰ Herbert v. Tuckal, 1663.

¹¹ Berkeley Peer., 1811, H. L. See Jackson v. Cooley, 1811 (Am.); Douglas v. Saunderson, 1791 (Am.); Carskadden v. Poorman, 1840 (Am.).

¹² In the Sussex Peer., 1844, H. L., an entry made by the mother of the claimant in her prayer book, declaring the fact of her marriage, was admitted in evidence.

been made by a relative; for as this book is the ordinary register of families, and is usually accessible to all its members, the presumption is that the whole family have more or less adopted the entries contained in it, and have thereby given them authenticity.¹ This presumption, however, will not prevail in favour of an entry in any other book of however religious a character, but proof must be given, either that the entry was made by some member of the family,² or that it has been acknowledged or treated by a relative as a correct family memorial,³ or, at least, if ancient, that it was made at the time when it purports to have been written. In order to establish this last fact, the evidence of skilled witnesses, conversant with manuscripts of different ages, is admissible, though, as before observed, such evidence is entitled to very little weight.⁴

§ 651.⁵ The *correspondence* of deceased members of the family,⁶ too, on proof of the handwriting,⁷ *recitals in family deeds* (such as *marriage settlements*,⁸ and other instruments⁹), *descriptions in wills*,¹⁰ and the like, will be received as evidence in pedigree cases. Moreover, recitals of descent, and descriptions of parties, in such deeds other than family instruments, will be received, provided such deeds come from the proper custody, and are proved, or may from age be presumed, to have been executed by some member of the family to which the statements refer.¹¹ Wherever the statement is contained in a deed, the execution of the deed by a relation is, however, an indispensable requisite.¹² But where the

¹ Berkeley Peer., 1811 (Lds. Ellenborough and Redesdale), H. L.; Monkton v. Att.-Gen., 1831 (Ld. Brougham); Hubbard v. Lees, 1866.

² Tracy Peer., 1843, H. L.; Crawford and Lindsay Peer., 1848, H. L.

³ Hood v. Beauchamp, 1836.

⁴ Tracy Peer., 1843, H. L.; ante, § 50.

⁵ Gr. Ev. § 104, in part.

⁶ Huntingdon Peer., 1818, H. L.; Kidney v. Cockburn, 1831; Leigh Peer., 1828, H. L.; Hastings Peer., 1840, H. L. See Butler v. Mountgarret, 1859, H. L.

⁷ Marchmont Peer., 1840, H. L. See Airth Peer., 1839, H. L.

⁸ Neal v. Wilding, 1740; De Roos Peer., 1804-5, H. L.; Chandos Peer.,

1791, H. L.; Zouch Peer., 1807, H. L.; Devon Peer., 1832, H. L.; L'Isle Peer., 1825, H. L.; Banbury Peer., 1809, H. L.; Vaux Peer., 1824, H. L.; Huntley Peer., 1838, H. L.; Roscommon Peer., 1824, H. L.

⁹ Smith v. Tebbitt, 1867; Stafford Peerage case, 1825, H. L.

¹⁰ Vulliamy v. Huskisson, 1838 (Ld. Abinger); De Roos Peer., 1804, H. L.; L'Isle Peer., 1825, H. L.

¹¹ Marmyon Peer., 1818, H. L.; Hastings Peer., 1840, H. L.; Borthwick Peer., 1812, H. L.; Hungate v. Gascoigne, 1846; De Roos Peer., 1804, H. L. See Stokes v. Dawes, 1826 (Am.).

¹² Slaney v. Wade, 1836; Foot v. Clarke, 1826.

declaration is contained in the draft of a will prepared by direction of the deceased, and on information derived solely from him, such draft is admissible.¹ And, *a fortiori*, a will which was duly executed, but which has been revoked as a will, is also admissible.² In regard to recitals of pedigree in old answers in Chancery (which were sworn), those relating to facts which were not in controversy are admitted, but those referring to facts which were then in controversy are excluded as made *post litem motam*.³ Recitals in old bills in equity are always inadmissible, being regarded as the mere flourishes of the draughtsman.⁴ The admissibility of proceedings in a Sheriff Court in Scotland is governed by the same principles.⁵

§ 652.⁶ *Inscriptions on tombstones*,⁷ coffin-plates,⁸ mural monuments,⁹ family portraits,¹⁰ engravings on rings,¹¹ hatchments,¹² charts of pedigree,¹³ and the like, are also admissible evidence in pedigree cases. Those proved to have been made by, or under the direction of, a deceased relative, are admitted as his declarations; such as are only proved to have been publicly exhibited, may be supposed to have been well known to the family, and they are also admitted on the ground of tacit and common assent.¹⁴ It is

¹ Lambert, *In re*, 1886.

² See *Doe v. Pembroke*, 1809.

³ See 1 Ph. Ev. 219, 220, and the authorities there cited. See, also, *De Roos Peer.*, 1804, H. L.

⁴ *Boileau v. Rutlin*, 1848 (Parke, B., citing the *Banbury Peer.*, 1809, H. L.). These cases appear to overrule *Taylor v. Cole*, 1799.

⁵ *Lyell v. Kennedy*, 1889, H. L.

⁶ Gr. Ev. § 105, in part.

⁷ *Monkton v. Att.-Gen.*, 1831; *Goodright v. Moss*, 1777.

⁸ *Chandos Peer.*, 1791, H. L.; *Rokeby Peer.*, 1830, H. L.; *Lovat Peer.*, 1827, H. L.

⁹ *Slaney v. Wade*, 1836; *De Roos Peer.*, 1804-5, H. L.

¹⁰ *Camoys Peer.*, 1839, H. L.

¹¹ *Vowles v. Young*, 1806.

¹² *Hungate v. Gascoigne*, 1846.

¹³ *Monkton v. Att.-Gen.*, 1831; *Goodright v. Moss*, 1777.

¹⁴ *Monkton v. Att.-Gen.*, 1831; *Davies v. Lowndes*, 1843. Parke, B., observes, "The ground upon which

the inscription on a tombstone or a tablet in a church is admitted, is that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence; where a pedigree hung up in the family mansion is received, it is on the ground of its recognition by the members of the family." Doubts have been expressed at *Nisi Prius* respecting the admissibility of an inscription on a tombstone in a burial-ground for *dissenters* (*Whittuck v. Waters*, 1830 (Park, J.)); but such doubts appear wholly groundless, since this species of evidence has been admitted by the House of Lords in peerage claims (*Say and Sele Peer.*, 1781, H. L.; *Hubback's Ev. of Succ.*, 1844, citing *Serj. Hill's Collect. in Linc. Inn Library*, vol. 26), and it may be pointed out that in the case cited an inscription on a tombstone in the dissenters' burial-ground in Bunhill Fields was admitted by the House of

presumed,—though this is a presumption which is doubtless often contrary to the fact,¹—that the relatives of a family would not permit an erroneous inscription to remain; and that a person would not knowingly wear a ring which bore a mis-statement upon it.²

§ 653.³ Mural and other funereal inscriptions are provable, as already shown,⁴ by *copies*, or other secondary evidence. Their value as evidence depends much on the authority under which they were set up, and on the distance of time between their erection and the events which they purport to commemorate.⁵ If parol testimony of their contents be offered, on the ground that the original monuments are destroyed or effaced, the court will not be satisfied, unless the prior existence of the monuments, and the genuineness of the inscriptions, be established in the very strongest manner that the circumstances will admit.⁶ The ease with which evidence of this nature can be manufactured, and the difficulty of fixing the witnesses with perjury, render it needful to enforce this rule with strictness.

§ 654. The family recognition of the truth of a document may not only arise from its publicity, but also from other circumstances. If a document, though privately kept, be clearly proved to have been preserved in a family as an authentic memorial of pedigree, it will be receivable in evidence without proof of its origin.⁷ The mere production, however, of a document from among the family archives,⁸ and, *a fortiori*, its production from a museum, or other public place of deposit,⁹ will not render it admissible, without proof that it was made or recognised by some member of the family.

Lords, and that inscriptions on *foreign* monuments have also been received in evidence: Hastings Peer., 1840, H. L.; Perth Peer., 1848, H. L.

¹ Some remarkable mis-statements on monuments are mentioned in 1 Ph. Ev. 222, n. 4. The author of this work found on a monument in a London cemetery this startling announcement:—"The victim of a mother's temper."

² Vowles v. Young, 1806 (Ld. Erskine).

³ Gr. Ev. § 105, in part as to first five lines.

⁴ Ante, § 438; and see Tracy

Peer., 1839-43, H. L.; Roscommon and Leigh Peer., 1824, H. L.; Slaney v. Wade, 1836; Perth Peer., 1848, H. L.

⁵ Athenry Peer., 1836, H. L.; Vaux Peer., 1836, H. L.; Fitzwalter Peer., 1842, H. L.

⁶ Tracy Peer., 1839, H. L. See Shrewsbury Peer., 1857, H. L.

⁷ Vaux Peer., 1836, H. L.; Camoys Peer., 1839, H. L.

⁸ Fitzwalter Peer., 1842, H. L.; Lovat Peer., 1827, H. L.; D. of Devonshire v. Neill, 1877 (Palles, C. B.), H. L. (Ir.).

⁹ Chandos Peer., 1791, H. L.

§ 655—6. The question how far a pedigree, purporting to have been *compiled*, either wholly or in part, *from registers* and other documents which are *not shown to have been lost*, is admissible, has been much discussed. A Welsh pedigree, proved to be in the handwriting of one of the ancestors of the defendant, produced from the proper custody, and tracing the genealogy of the family from an almost fabulous antiquity, and bringing the descent down to the immediate contemporary relatives of the writer, and containing at its foot a memorandum in these words: “Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, Esq., of Cwm Gloyne, this 4th day of July, A.D. 1733, by his loving kinsman, Wm. Lloyd,” was offered in evidence; and the Common Pleas rejected the whole. But the Exchequer Chamber, after much doubt and full consideration, decided that part, if not all, of the pedigree in question was receivable in evidence,¹ saying, “the pedigree in question was admissible, because it was certainly acknowledged by Wm. Lloyd to be correct.”

§ 657. *Armorial bearings*, whether carved on wood, painted on glass, engraved on monuments or seals, or otherwise emblazoned, are also admissible in cases of pedigree; not only as tending to prove that the person who assumed them was of the family to which they of right belonged, but as illustrating the particular branch from which the descent was claimed, or as showing, by the impalings or quarterings, the nature of the blazonry, or the shape of the shield, what families were allied by marriage, or what members of the family were descended from an illegitimate stock, or were maidens, widows, or heiresses.² The value of this evidence depends almost wholly upon its antiquity. Since the Revolution,³ the heralds have exercised no authority in correcting usurpation, and,

¹ *Davies v. Lowndes*, 1843 (Ld. Denman).

² Harl. MS. 1836, 6141; *Hervey v. Hervey*, 1772; *Chandos Peer.*, 1791, H. L.; *Huntingdon Peer.*, 1818, H. L.; *Hastings Peer.*, 1840, H. L.; *Shrewsbury Peer.*, 1857,

H. L.; *Fitzwalter Peer.*, 1842, H. L. *Camoy's Peer.*, 1667, H. L.; *Hub. Ev. of Suc.* 691.

³ The last Herald's visitation was in 1686, the first having been in 1528. See *Hub. Ev. of Suc.* 542.

therefore, the use of armorial bearings subsequently to that date is entitled to but little, if any, weight as evidence of genealogy.¹ When proof of this nature is offered, some officer of the Heralds' College should be in attendance, to explain the heraldic meaning of the evidence produced.²

¹ 1 Ph. Ev. 224; Hub. Ev. of Suc. 696.

² See Chandos Peer., 1791, H. L. Besides the different species of evidence enumerated above, the Heralds' books, inquisitions post mortem, parish books, registers, &c.,

are occasionally admissible as evidence,—not, however, as the hearsay evidence of relatives, but as public documents, and the law respecting them will be discussed hereafter: Part V. Chap. IV. See De Roos Peer., 1804, H. L.

AMERICAN NOTES.

Hearsay concerning Pedigree. — Where the facts of genealogy or of pedigree in a given family are the subject of judicial inquiry, the declarations of deceased members of the family affected are admitted as evidence of such facts, or of particular facts relevant thereto, if made *ante litem motam*. *Craufurd v. Blackburn*, 17 Md. 49 (1860); S. C. on appeal, 3 Wall. 175 (1865); *De Haven v. De Haven*, 77 Ind. 236 (1881); *Cuddy v. Brown*, 78 Ill. 415 (1875); *Jones v. Jones*, 36 Md. 447 (1872); *Harland v. Eastman*, 107 Ill. 535 (1883); *Northrop v. Hale*, 76 Me. 306 (1884); *Fowler v. Simpson*, 79 Tex. 611 (1891); *Dawson v. Mayall*, 45 Minn. 408 (1891); *Eisenlord v. Clum*, 126 N. Y. 552 (1891); *Elliott v. Peirsol*, 1 Pet. 328, 337 (1828); *Eaton v. Tallmadge*, 24 Wis. 217 (1869); *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

"It has, therefore, become a universally recognized exception to the general rule excluding hearsay, based on various sound considerations, that as to certain facts of family history, usually denominated pedigree, comprising *inter alia*, birth, death and marriage, together with their respective dates, and, in a qualified sense, legitimacy and illegitimacy, declarations are admissible; (1) When it appears by evidence *dehors* the declarations that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern; (2) That the declarant was dead when the declarations were tendered; and (3) That they were made *ante litem motam*." *Northrop v. Hale*, 76 Me. 306 (1884).

PARTICULAR FACTS. — Not merely the fact of relationship itself may be established by such declarations, but particular facts bearing on the issue may be proved in that way.

The fact of the existence of a marriage being involved in an issue of pedigree concerning the legitimacy of a claimant, declarations of the alleged husband both in favor of and against the marriage are admissible after his death. *Crawford v. Blackburn*, 17 Md. 49 (1860). The point relied upon, that unless the marriage were first found to be legitimate, the declarant could not be shown to be a member of the family of the claimant, was not sustained. *Ibid.* *Blackburn v. Crawfords*, 3 Wall. 175 (1865).

So a marriage may be proved by the declarations of a deceased wife. *Walker v. Murray*, 5 Ont. 638 (1884); *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877). Cohabitation need not first be shown to admit declarations establishing a marriage. *Copes v. Pearce*, 7 Gill. 247, 263 (1848).

"The term pedigree includes not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. These facts may be established by

general repute in the family, proved by a surviving member of it, in all cases where they occur incidentally and in relation to pedigree." *American, &c. Trust Co. v. Rosenagle*, 77 Pa. St. 507, 516 (1875).

A failure of heirs may be proved by the declarations of deceased members of the family. *People v. Fulton Fire Ins. Co.*, 25 Wend. 205 (1840). "The question is, were the statements as to independent facts, such as being a member of the army, presence in Texas, or the time and place of death, admissible under the rule? It is often stated that declarations of deceased members of a family are not admissible to prove the time nor place of birth, residence, or death. But this rule has been applied in the main to cases in which the poor-laws were being administered, and a right was being asserted based upon the residence or birth at a given place. Where the time or place of residence or death is introduced for the purpose of identifying the person in question as a member of a particular family, it is admissible as being so closely related to, if not in fact part of, pedigree, that the same rules of law are applicable. Mr. Phillips, in his work on Evidence, volume I., p. 207, (fifth American edition) states the rule so tersely that we copy it as the best statement of the proposition that we have been able to find. He says: 'Locality may, however, be so involved in pedigree as to fall within the general rule and render hearsay evidence admissible on the subject; as where the object is to identify certain persons connected with a particular place as belonging to a family.' This rule is well supported by many authorities, both English and American, and as we believe by sound principles of law. We cite the following authorities as applicable and in support of this rule: *Hubback Successions*, 322; *Shields v. Boucher*, 1 De Gex & S., p. 40; *Winder v. Little*, 1 Yeates (Pa.), 152; *Bishop v. Nesbitt*, 2 M. & R. 554; *Wise v. Wynn*, 59 Miss. 381; *Mullery v. Hamilton*, 71 Ga. 720; *Cuddy v. Brown*, 78 Ill. 415; *Morrell v. Foster*, 33 Conn. 379; *Ins. Co. v. Rosenagle*, 77 Pa. St. 507; *McNeil v. O'Connor*, 79 Texas, 227." *Byers v. Wallace*, 87 Tex. 503, 511 (1895).

The declarations of a deceased mother as to her son's marriage are competent to show that one claiming to be his son is illegitimate. *Barnum v. Barnum*, 42 Md. 251, 304 (1875). On a question of legitimacy, the declarations of a deceased father to the effect that his son was illegitimate, and that he had never married the boy's mother are competent. *Ibid.*

But see *State v. Watters*, 3 Ired. (N. C.) L. 455 (1843).

A mother may testify as to her son's legitimacy. *Caujolle v. Ferrie*, 26 Barb. 177 (1857).

A brother may testify as to the age of a sister from declarations of her deceased mother. "That this species of evidence must be

admitted has always been held, for otherwise a person could not prove his own age; for where no family record is made, he can only show it from the declarations of his parents." *Watson v. Brewster*, 1 Pa. St. 381 (1845).

So the date of a person's birth may be testified to by himself or by members of his family, although they knew the fact only by hearsay based upon popular tradition. *Houlton v. Manteuffel*, 51 Minn. 185 (1892).

Marriage may be proved by reputation in the family. *Morgan v. Purnell*, 4 Hawkes (N. C.) 95 (1825); *Barnum v. Barnum*, 42 Md. 251, 304 (1875).

"In all cases, except in actions of *crim. con.*, and prosecutions for bigamy, the fact of marriage may be established by evidence of the acts and declarations of the parties, by proof of the general repute in the family, and by proof of the declarations of deceased persons, who were related to them by blood or marriage." *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Jackson v. Jackson*, 80 Md. 176 (1894). *Barnum v. Barnum*, 42 Md. 251 (1875), adds seduction to this list of exceptions.

Whether the place of residence of a member of the family may be proved in this way is somewhat in dispute. It has been held that it may be. The supreme court of Mississippi say:—

"This ruling of the learned judge was based upon the dicta of many authorities to the effect, that while in questions of pedigree the hearsay declarations of a deceased member of a family are receivable in evidence, as to all matters of birth, death, age, marriage, and the like, declarations as to place are not. The later and better considered cases, however, repudiate this distinction between declarations as to place and those touching other family matters, where the inquiry is strictly one of pedigree, and the declarations as to place are not relied on as giving any right by reason of the place, but proof as to place is made merely by way of identification of the person or family. Thus, in a question of settlement under the poor laws, where the right of settlement is dependent upon the place of present or former residence, hearsay declarations as to place are inadmissible; but where the question is purely one of pedigree, and the effort is to identify the particular person or family about whom the declarant was speaking, declarations as to place stand upon the same footing as any others relative to matters of family history." *Wise v. Wynn*, 59 Miss. 588 (1882).

But declarations or reputation in the family as to the residence or birth of a person in a particular place are not competent by the weight of authority, unless they can be considered as part of the *res gestæ*. *Londonderry v. Andover*, 28 Vt. 416 (1856); *Union v. Plainfield*, 39 Conn. 563 (1893). The same is true of a record

entry in a family Bible. *Union v. Plainfield*, 39 Conn. 563 (1873); *Currie v. Stairs*, 25 New. Bruns. 4 (1885).

The time of a birth may be shown by the declarations of a deceased member of the family though there is a "family register of births" which is not produced. "The grade is the same." *Clements v. Hunt*, 1 Jones (N. C.) L. 400 (1854).

So the death of a person may be shown by "information received from the family." *Du Pont v. Davis*, 30 Wis. 170 (1872); *Anderson v. Parker*, 6 Cal. 197 (1856); *Mason v. Fuller*, 45 Vt. 29 (1872).

Or by the declarations of a deceased member of the family. *Morrill v. Foster*, 33 N. H. 379 (1856). "The phrase, 'pedigree,' embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened." *Kelly v. McGuire*, 15 Ark. 555, 604 (1855).

On an action of ejectment, where the lessors of the plaintiff claimed as heirs at law of A., A.'s declarations to the effect the plaintiffs were the children of a married sister, deceased, and his nearest living relations are competent to prove the relationship, marriage and birth of children in wedlock. *Moffit v. Witherspoon*, 10 Ired. (N. C.). L. 185 (1849).

A declarant may state that A. is her natural son, born before her marriage. *Northrop v. Hale*, 76 Me. 306 (1884).

INQUIRY MUST RELATE TO PEDIGREE. — Where the issue is of the settlement of a pauper, his birthplace or residence in a particular town cannot be proved by reputation in the family or declarations in any form by deceased members of it. *Union v. Plainfield*, 39 Conn. 563 (1873); *Londonderry v. Andover*, 28 Vt. 416 (1856); *Independence v. Pompton*, 9 N. J. Law 209 (1827); *Wilmington v. Burlington*, 4 Pick. 174 (1826).

"It is settled that hearsay is not admissible to prove the place of a person's birth." *Adams v. Swansea*, 116 Mass. 591 (1875); *Currie v. Stairs*, 25 New Bruns. 4 (1885); *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545 (1821); *Tyler v. Flanders*, 57 N. H. 618 (1876).

But in an action of ejectment, the death of a joint tenant can be shown by such declarations. *Du Pont v. Davis*, 30 Wis. 170 (1872).

On the settlement of a pauper, the question of the legitimacy of his father, through whom the settlement was claimed, being essential, a witness testified that she had seen his father alive during the lifetime of S. B., who died the year before the father's parents were married. To prove the date of the death of S. B., "The defendants then offered, as evidence that Susanna died on the 12th of December 1803, a large ornamented sheet of parchment, bearing the inscription 'family record,' on which were entered the dates of the birth and marriage of Susanna Blair's parents, the dates of

the birth and death of Susanna, and of the births, marriages and death of two sons born subsequently of the same parents. One of these sons, forty-seven years old, testified that, ever since his earliest recollection, his father had kept this parchment framed and hanging in a conspicuous place in his dwelling-house, and had handed it down to him; that during all this time the same entries had been on it; and that his father and mother were dead. And there was evidence that the entries of the births and deaths upon the parchment were made, all at one time, by direction of Susanna's father, more than forty years before the trial; that the record of the marriages of his children had been added, from time to time, as they occurred; and that he and his son kept and exhibited the parchment as a true statement of the events recorded on it.

The defendants also offered to prove that an ancient gravestone in the burial-ground of the Blair family bore the name Susanna, and had inscribed on it December 12th, 1803 as the date of her death." Both declarations were held admissible. *No. Brookfield v. Warren*, 16 Gray, 171 (1860).

A tendency to extend the exception to cases where facts of family history are relevant to inquiries other than those of genealogy is plainly apparent. Thus in an action against a life insurance company on a policy on the life of A., A.'s declarations as to her own age have been held competent as a question of pedigree. *Mutual Life Ins. Co. v. Blodgett*, Tex. 27 S. W. 286 (1894).

WHO MAY BE DECLARANTS. — Any member of the family or the husband or wife of such member is qualified as a declarant.

The mother of a bastard is a member of the family of her son, by statute, sufficiently to make declarations as to his parentage, admissible after his decease. *Northrop v. Hale*, 76 Me. 306 (1884).

The declaration of a deceased husband that the father and mother of his wife were never married is competent on an issue of genealogy. "He does not appear to have named the person from whom he derived his information, nor to have stated that his knowledge was derived from the general understanding and reputation in his wife's family. But the knowledge of events of this description most generally exists in every family, and hence the declarations of one of its members is admissible, although he does not mention the source from which he derived his information; and such declarations are equally admissible, whether his connection with the family is by blood or marriage." *Jewell v. Jewell*, 17 Peters, 213, 221 (1843); *Nunn v. Mayes*, (Tex.) 30 S. W. 479 (1895).

Neighbors, though acquainted with the facts, cannot be declarants. "Parties cannot establish pedigree by proving what the neighbors thought or said upon the subject of the paternity of the

person whose pedigree is in dispute. Proof of pedigree is restricted to the declarations of deceased persons who are related by blood or marriage to the person whose parentage is the subject of investigation." *De Haven v. De Haven*, 77 Ind. 236 (1881); *Northrop v. Hale*, 76 Me. 306 (1884); *Branch v. Texas Lumber Mfg. Co.*, 56 Fed. Rep. 707 (1893).

This is true even if the hearsay takes the form of general reputation. *Henderson v. Cargill*, 31 Miss. 367, 419 (1856).

One whose only information came from "talks with the family" and "reports from his relations," neither the dates of such talks and reports, the decease of the informants, nor the degree of the relationship of the informants to the person whose pedigree was in controversy being shown, is not competent to testify. *Wallace v. Howard*, (Tex.) 30 S. W. 711 (1895).

It was suggested in an early Connecticut case that the rule would admit the declarations of "those who had lived in the family" to prove relationship. *Chapman v. Chapman*, 2 Conn. 347 (1817). And there are *dicta* to the same effect in *Jackson v. Cooley*, 8 Johns. 128 (1811), e. g., "The declarations of persons, who from their situation are likely to know, are competent evidence." And a late case in Texas has gone so far as to admit ancient documents by third parties as relevant on pedigree. *Howard v. Russell*, 75 Tex. 171 (1889). But even a trusted family servant's statement as to the death of a member of the family is not competent. *Doe d. Arnold v. Auldjo*, 5 Q. B. U. C. 171 (1848).

Where the reputation in the family is the fact relied on, proof can only be made by the surviving members of the family. *Dupoyster v. Gagani*, 84 Ky. 403 (1886); *Morgan v. Purnell*, 4 Hawkes (N. C.) 95 (1825); *Barnum v. Barnum*, 42 Md. 251, 304 (1875).

In a case in Michigan the court say:—"The inquiry related to family connection and membership and to the decease, and times of decease of members, and whether they had been or were married; and the answers returned, although in part based on the course of speech and understanding in the family instead of direct personal knowledge, would seem to have been proper in view of the nature of the subject." *Van Sickle v. Gibson*, 40 Mich. 170 (1879).

The relationship to the family must be established by evidence *aliunde*. *Doe d. Dunlap v. Servos*, 5 Q. B. U. C. 284 (1849). "Otherwise evidence to support a case of this kind might be got up on the declaration of the merest stranger, first receiving his declaration to establish the supposed relationship, which alone would make his declaration of any weight, and then receiving his declaration as to the principal fact." *Ibid.* *Lamoreaux v. Atty. Gen.* 89 Mich. 146 (1891).

The declarations of a sister of an alleged wife as to her sister's marriage with A. do not constitute evidence *aliunde* that the necessary relationship exists between her sister and A. on an inquiry of pedigree in A.'s family. *Blackburn v. Crawfords*, 3 Wall. 175 (1865). "If it had been proved by independent testimony that Sarah Evans was related by blood to any branch of the family of David Crawford, and her declarations had been offered to prove the relationship of another person claiming, or claimed to belong also to that family, this case would be in point. But the declaration of Sarah Evans, offered to prove that her sister was connected by marriage with a member of that family, was neither within the principle nor the language of that authority."

In pursuance of this qualification upon the rule, it has been suggested that the declaration of A., a deceased person, that he had a brother living at a particular place would not be evidence sufficient of itself to enable his own children to claim as heirs of the brother. *Wise v. Wynn*, 59 Miss. 588 (1882). But that, on the contrary, such declarations can be received to enable the estate of the brother to claim in the property of the declarant. *Ibid.* *Cuddy v. Brown*, 78 Ill. 415 (1875).

When the declaration of a deceased person as to pedigree is offered to show that A. and B. were related to each other by blood, it is sufficient, to lay the ground for its introduction, to show that the declarant was connected with the family of A.; it is not necessary to show by evidence *dehors* the declaration, that the declarant was also related to B. *Gehr v. Fisher*, 143 Pa. St. 311 (1891).

The rule requiring evidence of relationship *aliunde* does not require that the declaration and the evidence *dehors* the declaration should come to the tribunal by separate witnesses. So where a certain witness was relied on to sustain the whole weight of the proof, the court held it sufficient. "Here the witness bore the same name as the ancestor, lived in the neighborhood with the other sons of his grandfather, knew the names of the family, and seemed acquainted with the farms which they owned, and other minute facts concerning them besides the circumstance of being requested as heir-at-law to join his uncle in the mortgage referred to.

"No objection was suggested at the trial that he was not a competent witness to prove the declaration of his mother, grandmother and uncles as to his heirship, for want of independent evidence of his connection with the family." *Wallbridge v. Jones*, 33 U. C. Q. B. 613 (1873).

"This evidence is primarily addressed to the presiding justice, who, before admitting the declarations, must be satisfied that a *primâ facie* case of the requisite relationship has been made out. . . . And the facts shown, the birth, place of birth, the

bringing up and the name of the appellant, are ample *primâ facie* evidence of relationship to warrant the admission of the declaration mentioned." *Northrop v. Hale*, 76 Me. 306 (1884).

It is only necessary that a *primâ facie* case of relationship to the family should be established by other evidence than the declarations, and slight proof will suffice where there is identity of names, great lapse of time and other corroborating circumstances. *Brown v. Lazarus*, 5 Tex. Civ. App. 81 (1893).

FORM OF DECLARATION. — The form of the declaration and the medium through which it is conveyed to the tribunal are immaterial.

A reference in A.'s will to his children by B. as "his natural children" by her is a competent declaration after his decease on the question of the existence of a marriage to B. or an issue of pedigree involving the existence of such marriage. *Blackburn v. Crawfords*, 3 Wall. 175 (1865). "The entry of a deceased parent, or other relative, made in a Bible, family missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death, of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree. Correspondence of deceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts, are original evidence, where the oral declarations of the parties are admissible. Inscriptions on tombstones, and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, are also admissible, as original evidence of the same facts." *Kelly v. McGuire*, 15 Ark. 555, 604 (1855).

It is not even necessary that the declaration should relate directly to any fact of pedigree. Thus the declaration of a father speaking of his daughter, "that unless he made a will Louisa could get nothing by law," is competent on the question of her legitimacy. *Viall v. Smith*, 6 R. I. 417 (1860).

Recognition in a deed is sufficient. *Barnum v. Barnum*, 42 Md. 251, 296 (1875); *Jackson v. Cooley*, 8 Johns. 128 (1811); *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310 (1875); *Stokes v. Dawes*, 4 Mason, 268 (1826). Or in a will. *Gaines v. New Orleans*, 6 Wall. 642 (1867).

A recital in a deed by a mother is not admissible to prove that her husband had not had access to her, and that consequently the child was illegitimate. *Watts v. Owens*, 62 Wis. 512 (1885).

A statement in a letter is sufficient. *Byers v. Wallace*, 87 Tex. 503 (1895).

A "family record" of dates of births, deaths, marriages, &c., made by deceased members of the family, is competent. *North Brookfield v. Warren*, 16 Gray, 171 (1860); *Eastman v. Martin*, 19 N. H. 152 (1848); *Whitcher v. McLaughlin*, 115 Mass. 167 (1874).

"The existence of a family register does not exclude proof of declarations of deceased members of the family." *Swink v. French*, 11 Lea, (Tenn.) 78 (1883). A record is competent if made by a stranger under the instructions of a member of the family. *State v. Joest*, 51 Ind. 287 (1875).

"A pedigree is admissible, though not hung up or made public, on proof of its having been made by a member of the family. If hung up, it is admissible without proof of its having been made by direction of the family, on the ground that it is a family acknowledgment. . . . If the pedigree be hung up publicly in a family mansion, it would be admissible without knowing who was its author." *Eastman v. Martin*, 19 N. H. 152 (1848).

A familiar form of record is the family Bible. Declarations in such form of facts of pedigree made by deceased members of the family are competent evidence of the facts therein stated. *Greenleaf v. Dubuque, &c.*, R. R. 30 Ia. 301 (1870) *Southern, &c., Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874); *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

The facts that the entries were made all at one time by a deceased sister and not generally admitted in the family to be accurate, affect only the weight of the evidence. *Southern, &c., Ins. Co. v. Wilkinson*, 53 Ga. 535 (1874).

The inscriptions on an ancient gravestone are competent to show dates and other facts of pedigree. *North Brookfield v. Warren*, 16 Gray, 171 (1860); *Barnum v. Barnum*, 42 Md. 251, 306 (1875); *Smith v. Patterson*, 95 Mo. 525 (1888); *Eastman v. Martin*, 19 N. H. 152 (1848).

A written memorandum enclosing a lock of hair is competent. *Barnum v. Barnum*, 42 Md. 251, 304 (1875).

"Family history is nothing but the declaration of different members of a family repeated by so many persons and for such a time as to become common repute in the family. Upon the same subjects the family history and the declarations of a deceased member of a family are equally admissible; the weight to be given to each . . . depends upon the circumstances, and is a question for the jury, not a question of admissibility." *Byers v. Wallace*, 87 Tex. 503 (1895).

BASIS OF THE RULE. — It is said by the learned author (§ 635) that "this exception rests on the ground of necessity." While this was undoubtedly a main reason for its adoption, the same necessity has not sufficed to admit the statements of deceased persons in other connections, though no other evidence is available.

Per contra, the declarations regarding pedigree are competent, though there is no necessity for receiving them. So in a case where the fact in dispute was the existence of a certain marriage, it was objected that evidence of the statements of the deceased

alleged husband was incompetent because the alleged wife was present as a witness. "This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but they are admitted as primary evidence on such subjects by the established rule of law, which, though said to have had its origin in necessity, is universal in its application. Nor do such declarations stand upon the footing of secondary evidence, to be excluded where a witness can be had who speaks upon the subject from his own knowledge. 'Hearsay evidence is of course inadmissible, if the person making the declaration is alive, and can be called. But the declarations of a deceased mother, as to the time of the birth of her son, are admissible, though the father is living and not called.' Hubback on the Evidence of Succession, 660," *Craufurd v. Blackburn*, 17 Md. 49 (1860). To the contrary effect, see *Covert v. Hertzog*, 4 Pa. St. 145 (1846), a case which holds that where there are living witnesses of cohabitation, evidence of the declarations of a deceased relative as to the fact of a marriage is not competent. *Ibid.*

The supreme court of Alabama has declined to receive reputation in A.'s family as to her age, so long as the evidence of living witnesses is available, and where those who declare the reputation are themselves present in court. *Rogers v. De Bardeleben, &c.* Co. 97 Ala. 154 (1892).

It may be concluded, however, that these declarations do not so strongly contravene the line of legal policy which has established the hearsay rule, as would be the case with many other declarations of deceased persons. In most cases, the fact that a declaration has been made is, in and of itself, circumstantial evidence of the truth of the statement of a probative weight so slight as to require that it be withheld from the jury. Where the mere making of a statement is to a certain extent probative of its truth; in other words, where the statement is not accepted, if at all, as resting on the credit of a deceased person not examined as a witness, but because the making of it is circumstantial evidence of its truth, the precise evils intended to be prevented by the hearsay rule do not present themselves in unmitigated form. It will be found, it is believed, that this general line of thought can be traced, more or less distinctly, in many of the exceptions to the hearsay rule, — *e. g.*, dying declarations, entries in course of business, books of account, declarations against interest, &c.

If the declaration does not rest at all upon the credit of the declarant; *i. e.*, where the statement is relevant regardless of its truth or falsity, *e. g.*, on an issue of self-defence, that an alleged murderer had been told that the deceased was carrying a pistol and had threatened to shoot the prisoner at sight, *Stokes v. People*, 53

N. Y. 164 (1873) the hearsay rule has no application. This rule is considered elsewhere.

Apparently the statement of the deceased member of the family is admitted on the issue of genealogy, because it is, in a certain degree, circumstantial evidence of the truth of the statement.

Reputation in the family is competent circumstantial evidence of relationship, and of the facts of pedigree on such an issue, though usually it is only hearsay; — so mellowed by time that the individual voices are lost. *Kelly v. McGuire*, 15 Ark. 555, 605 (1855); *Harland v. Eastman*, 107 Ill. 535 (1883); *Viall v. Smith*, 6 R. I. 417 (1860); *Doe d. Arnold v. Auldjo*, 5 Q. B. U. C. 171 (1848) *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Butrick v. Tilton*, 155 Mass. 461 (1892).

“Traditional declarations become the best evidence sometimes, when those best acquainted with the fact are dead. When derived from those who are most likely to know the truth, and are under no bias to misrepresent the fact, such evidence affords a reasonable presumption of the truth.” *Eisenlord v. Clum*, 126 N. Y. 552, 564 (1891); *Eaton v. Tallmadge*, 24 Wis. 217 (1869). “Common reputation in the family, is admissible as evidence of a marriage in that family; and it is said that the declarations of an individual of that family, are evidence of that common reputation. But such declarations must have been made before any contest had arisen in regard to the marriage. It is necessary that they should have been made not only without any view of benefiting the person making them, but also without a view of benefiting any other; that they should have flowed from a desire only of speaking the truth, which all are presumed to have, when there is no motive to declare the contrary. The person, therefore, who offers such declarations, must show that they were made under such circumstances; it is a prerequisite to their admissibility.” *Brady v. Wilson*, 4 Hawks (N. C.) 93 (1825).

Recognition as a relative by other members of the family is clearly good circumstantial evidence on such an issue. *De Haven v. De Haven*, 77 Ind. 236 (1881); *Viall v. Smith*, 6 R. I. 417 (1860); *Henderson v. Cargill*, 31 Miss. 367, 409 (1856); *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877); *Gaines v. Green Pond Iron Mining Co.* 32 N. J. Eq. 86 (1880).

“The declarations are admitted upon the theory that they tend to show that the person to whom they refer was recognized and treated as one of a family. The statements of an ancestor or deceased kinsman are not to be regarded as separate and distinct conversations, constituting in themselves independent subjects of investigation, but they are to be taken as a connected and indivisible thing indicating the treatment of the person whose pedigree is in dispute. The acts and declarations of the deceased kinsman

are an entirety, and the question is, not simply what he said or did on one day, or within one week, but what was his general line of conduct." *De Haven v. De Haven*, 77 Ind. 236 (1881); *White v. Strother*, 11 Ala. 720 (1847); *Eaton v. Tallmadge*, 24 Wis. 217 (1869).

So the fact that in making up "a register of my children" in the family Bible a father omitted the name of a child by a particular woman, is circumstantial evidence of illegitimacy. *Chamberlain v. Chamberlain*, 71 N. Y. 423 (1877).

Declarations accompanying such acts of recognition would clearly be admissible as part of the *res gestæ*.

It is plain, however, that in cases of pedigree the declarations to be admissible need not constitute part of the *res gestæ*. If they do, they are admissible on that ground; — irrespective of any question of admissibility as being involved in a case of pedigree.

Even declarations, without more, of deceased members of a family as to the existence of a relationship between themselves and a particular individual partake somewhat, though to a lesser degree than in case of reputation and recognition in the family, of the same probative force. Personal and family pride; the general interest in accuracy; a constant discussion among members of the family and the consequent correction of mistakes; — make it probable that the statement would not have been made and accepted unless it had been true. "It seems now to be settled, that the principle upon which the law resorts to hearsay evidence in cases of pedigree, is 'the interest of the declarants in the person from whom the descent is made out, and their consequent interest in knowing the connexions of the family.' And hence the rule of admission is restricted to the declarations of deceased persons, who were related by blood or marriage to the person, and therefore interested in the succession in question. And under this rule it is held, that general repute in the family may be proved by the testimony of a surviving member of it." *Henderson v. Cargill*, 31 Miss. 367, 418 (1856).

LIS MORA. — That the declaration must be made *ante litem motam*, see *Northrop v. Hale*, 76 Me. 306 (1884); *Morgan v. Purnell*, 4 Hawkes (N. C.) 95 (1825); *Caujolle v. Ferrie*, 26 Barb. 177 (1857).

"But the declarations of a deceased member of the family are not to be admitted, unless it appears they have been made under such circumstances that the relation may be supposed to be without an interest, and without a bias. If they were to be made on a subject in dispute, after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received in evidence, on account of the probability that they were partially drawn from the deceased, or perhaps intended by him to serve

one of the contending parties." *Chapman v. Chapman*, 2 Conn. 347 (1817).

Probably the *lis mota* must concern the subject matter of the declaration or the qualification will not apply. *Elliott v. Peirsol*, 1 Pet. 328, 337 (1828).

DECLARANT MUST BE DECEASED. — *Harland v. Eastman*, 107 Ill. 535 (1883); *Dupoyster v. Gagini*, 84 Ky. 403 (1886); *Northrop v. Hale*, 76 Me. 306 (1884); *Mooers v. Bunker*, 29 N. H. 420 (1854); *Robinson v. Blakely*, 4 Rich. (S. C.) 586 (1851); *Rogers v. De Bardeleben, &c.*, Co. 97 Ala. 154 (1893); *Smith v. Geer* (Tex.) 30 S. W. 1108 (1895). While the declarant must be deceased, his statement may be proved by any one. If, however, the fact to be shown is reputation in the family, this can only be shown by a surviving member of the family; and if alive, by his evidence in court. "It is only in the instance that the declarant is dead, and was related to the person in question by blood or marriage, that his declarations as to the relationship, and the degree of it, of such person can be proved by third persons; and any person, whether related or not, if otherwise competent as a witness, who heard such declarations, may prove them. If, however, such relationship is attempted to be proved by the general repute in the family, and not by the declarations of its deceased members, then the proof must be confined to the surviving members of it. If the declarant is not dead, then it is not competent to prove his declarations, because he can himself testify to the fact, which is the best testimony." *Dupoyster v. Gagini*, 84 Ken. 403, 409 (1886).

So to render an entry of births and deaths in a family Bible or record admissible in evidence, the entry must have been made by a deceased parent. If it is not shown that the parent who made the entry is deceased, it will be inadmissible. *Greenleaf v. Dubuque &c. R. R.* 30 Ia. 301 (1870). "The evidence is clearly incompetent, upon two grounds. 1. The date of a birth and death of an individual, being matter of pedigree, may be proved by hearsay evidence and general repute in his family, and an entry of a deceased parent, made in a bible, is regarded as a declaration of the parent making the entry and therefore admissible. 1 Greenl. Ev. § 104; 1 Phil. Ev. (Cow. & Hill's and Edw. Notes) 249-252 and notes.

"It will be observed that entries of this character, in order to be competent evidence, must have been made by a deceased parent or relative. This witness in the case before us does not prove, nor is it otherwise shown, that the father of decedent was dead. For this reason the evidence was inadmissible. 2. The evidence introduced was secondary in its character. The family record itself is not offered in evidence, but the witness gives, in his deposition, a copy thereof, or rather recites in his deposition the contents of the record.

It is not such a record that it may be proved by an examined copy, but, as all private writings, must be produced. If its absence be properly accounted for, secondary evidence, as a copy or proof of its contents, is admissible. 1 Phil. Ev. (Cow. & Hill's and Edw. Notes) 250 and notes; 1 Greenl. Ev. § 958 and notes." Greenleaf *v. Dubuque &c. R. R. Co.*, 30 Ia. 302 (1870). To the contrary effect, see *Carskadden v. Poorman*, 10 Watts. 82 (1840).

CHAPTER V.

ANCIENT POSSESSION.

§ 658. A THIRD EXCEPTION to the general rule by which hearsay evidence is rejected, exists in favour of *ancient documents* (by which is meant documents more than thirty years old), when they are tendered in support of *ancient possession*. These are often the only attainable evidence of ancient possession, and therefore, the law, yielding to necessity, allows them to be read on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but *purport* to have formed a part of the act of ownership, exercise of right, or other transaction to which they relate. This species of proof demands careful scrutiny, for, first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next, the documents are not *proved*, but are only *presumed* to have constituted part of the *res gestæ*. Forgery and fraud are, however, matters, comparatively speaking, of rare occurrence, and a fabricated deed generally betrays, from some anachronism or other inconsistency, internal evidence of its real character. The danger of admitting these documents is, consequently, less than might be supposed. It is more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance of evils, this kind of proof has, subject to certain qualifications, for many years past been admitted.¹

§ 659. But care is especially taken to ascertain the *genuineness* of the ancient documents produced; and this may in general be

¹ See 1 Ph. Ev. 273; 1 St. Ev. 67; Gr. Ev. § 141; and Best, Ev. 615.

shown, *primâ facie*, by proof that they come from the *proper custody*.¹ Proof of this is, however, required not only where documents are tendered in support of ancient possession, but in most cases where deeds, papers, or writings are rendered admissible by any rule of law without strict proof of their authenticity. It, therefore, is highly important to explain, with as much precision as possible, the legal meaning of the words "proper custody."² The subject will, therefore, be illustrated in this place once for all.

§ 660. As to what is "proper custody," Tindal, C. J., has said,^{2a} "Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit*. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various, that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases."³

§ 661. These principles have accordingly led, on the one hand, to the rejection of old grants to abbeys, offered as evidence of private rights, where the possession of them appears altogether

¹ See ante, §§ 432 et seq.

² As to what is "proper custody," see *Bishop of Meath v. Marquis of Winchester*, 1836. See, also, *Doe v. Samples*, 1838 (*Patteson, J.*); *Doe v. Phillips*, 1845.

^{2a} In *Bishop of Meath v. Marquis*

of *Winchester*, 1836.

³ For American authorities, see *Bar v. Gratz*, 1819; *Winn v. Patterson*, 1835; *Clarke v. Courtney*, 1831; *Hewlett v. Cock*, 1831; *Duncan v. Beard*, 1820; *Middleton v. Mass*, 1819.

unconnected with the persons who had any interest in the estate;¹ of a manuscript found in the Heralds' Office, enumerating the possessions of a dissolved monastery, the possession of which is unconnected with an interest in the property;² of a curious manuscript book, entitled the "Secretum Abbatis," preserved in the Bodleian Library at Oxford, and containing a grant to an abbey;³ of an old grant to a priory, brought from the Cottonian MSS. in the British Museum;⁴ and of ancient writings, purporting respectively to be, the one an endowment of a vicarage, and the other an inspeximus of the endowment under the seal of a bishop, purchased at a sale as part of a private collection of manuscripts.⁵ The registers of burials and baptisms (being by statute⁶ required to be kept by the clergyman of the parish either at his own residence or in the church) have, in the absence of all explanation on the subject, been rejected, as not coming from the proper custody, when produced from the house of the parish clerk.⁷ Terriers found among the papers of a mere landholder in the parish must also be rejected,⁸ because the legitimate repository for such documents would be either the registry of the bishop, the registry of the archdeacon, or the church chest.⁹

§ 662. In further accordance with the principles above summarized by Tindal, C. J., it has, on the other hand, been held that the poor-house of a union is not an improper repository for the documents of any parish within the union;¹⁰ that an old chartulary of a dissolved abbey may be admitted, when found in the possession of the owner of part of the abbey lands, though not of the *principal proprietor*;¹¹ that an old book of a collector of tithes is equally well

¹ 3 Bing. N. C. 201, 1836 (Tindal, C.J.).

² Lygon v. Strutt, 1795.

³ Michell v. Rabbetts, 1810.

⁴ Swinnerton v. M. of Stafford, 1810.

⁵ Potts v. Durant, 1795.

⁶ 52 G. 3, c. 146, §§ 1 and 5.

⁷ Doe v. Fowler, 1850.

⁸ Atkins v. Hatton, 1794; Atkins v. Ld. Willoughby De Broke, 1794. See, also, Bidder v. Bridges, 1885 (Kay, J.).

⁹ Armstrong v. Hewett, 1817; Potts v. Durant, 1796. In Randolph v.

Gordon, 1815, this doctrine was carried to its extreme limit, for the grandson of a former rector, having produced a book purporting to be the book of such rector, it was rejected, as he did not show that he had found it among his grandfather's papers, or that it had come into his possession in a legitimate manner: see, also, Manby v. Curtis, 1815.

¹⁰ Slater v. Hodgson, 1846.

¹¹ Bullen v. Michel, 1816. See, also, R. v. Mytton, 1860. The strictly proper custody for such a document as this would have been

authenticated, whether produced from the custody of the successor, or executor, of the incumbent, or from the hands of the successor of the collector;¹ and that an unproved will, more than thirty years old, disposing of real and personal estate, and produced from the custody of a younger son of the testator, who, in common with his brothers, derived a benefit under it, may be admitted, though it was contended that it ought to have been deposited in the ecclesiastical court of the diocese.²

§ 663. Again, an expired lease produced from the custody of the lessor, and proved to have been received by him from a former occupier of the demised premises, who had for several years paid the precise rent reserved by it, and had, subsequently to the expiration of the term, procured such expired lease from two strangers who claimed no interest in it, and delivered it up to the lessor, was held to be admissible, without proof in what manner it had come into the hands of these strangers.³ A case stated for counsel's opinion by a deceased bishop, respecting his right of presentation to a living, has been admitted against a subsequent bishop of the same see, on a question touching the same right, though the paper was not found in the public registry of the diocese, but among the private family documents of the descendants of the former bishop;⁴ and a settlement, reserving a life estate to himself, and coming from amongst the settlor's papers, has, where more than thirty years old, been allowed, in an action of ejectment by his subsequent incumbencers, to be put in evidence, though it was strongly urged that the trustees or their representatives were the parties entitled to its custody.⁵ Again, a deed to which as well as to the suit, trustees and executors were parties, when produced by them comes from proper custody.⁶

§ 664. There is some doubt whether the custody of a document must be proved by a sworn witness, when it purports on its face to

the Augmentation Office (*Bullen v. Michel* (Ld. Redesdale), *supra*); but as between the different proprietors of the abbey lands, it might naturally be supposed to have been deposited with the largest; and the court held, that its actual place of custody was one where it might reasonably be expected to be found: *Bishop of Meath v. Marquis of Winchester*, 1836 (Tindal, C.J.).

¹ *Id.*; referring to *Jones v. Waller*, 1753.

² *Doe v. Pearce*, 1839 (Coleridge, J.); *Andrew v. Motley*, 1862.

³ *Rees v. Walters*, 1838.

⁴ *Bp. of Meath v. M. of Winchester*, 1836.

⁵ *Doe v. Samples*, 1838. See, also, *Bertie v. Beaumont*, 1816; *Ld. Trimblestown v. Kemmis*, 1843, H. L.

⁶ *Miller v. Wheatley*, 1890 (Ir.).

belong to the party who tenders it in evidence. In one or two settlement cases, the respondents were permitted to produce old certificates, purporting to have been granted to them by the appellants, without giving any account respecting their custody.¹ But where,² on a question of boundary, plaintiff's counsel proposed to read certain manor-books without proving the custody whence they came, on the ground that they belonged to the lord, who was admitted to be the real plaintiff, the court held that they could not be read; Coleridge, J., observing that, unless some witness was sworn for the purpose of proving their custody, they might have been procured from a grocer's shop. But where the witness producing the document can swear that he received it from the representative of the person originally entitled to it, as a paper which had belonged to such person, this evidence will in ordinary cases be sufficient, without calling the representative himself to explain how he became possessed of the document.³

§ 665. The mere production of an ancient document, unless supported by some corroborative evidence of *acting* under it, or of modern *possession*, would be entitled to little, if any, weight.⁴ Still, there appears to be no strict rule of law, which would authorise the judge in withdrawing it altogether from the consideration of the jury:—in other words, the absence of proof of possession affects merely the *weight*, and not the *admissibility*, of the instrument.⁵

§ 666. For instance, where, to prove a prescriptive right of fishery as appurtenant to a manor, ancient licences to fish in the locus in quo, appearing on the court-rolls, as granted by former lords in consideration of certain rents, were tendered in evidence, it was held that they were admissible without any proof of the rents having been paid—but it was added that, to give them any *weight*, it must be shown that in latter times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over the fishery, which had been acquiesced in;”⁶ in an action brought to try the title to the bed of a river, after proof of a grant from Henry VIII., two counterparts

¹ R. v. Ryton, 1793; R. v. Netherthong, 1814.

² Evans v. Rees, 1839.

³ Earl v. Lewis, 1801 (Heath, J.).
See Doe v. Keeling, 1848.

⁴ 1 Ph. Ev. 276, 278.

⁵ Malcomson v. O'Dea, 1863, H. L.; Bristow v. Cormican, 1878, H. L. (Ld. Blackburn).

⁶ Rogers v. Allen, 1808 (Heath, J.); Malcomson v. O'Dea, 1863, H. L.

of leases having been produced from the plaintiff's muniment room, comprehending the soil in question, but no proof of any payment by a tenant, nor of any modern act of ownership having been given, the instruments were nevertheless admitted as coming from the right custody, the judge observing that no circumstance in the case threw suspicion upon them, and that "the absence of other kinds of proof was mere matter of observation;"¹ and in one of the numerous ejectments brought by Lord Egremont,² a document produced from the muniment room of the property inherited from such ancestor, which purported to be a counterpart of a lease of this land made by him but executed only by the lessee, was held admissible in evidence to show that the land in question had been part of the estate of the lessor's ancestor, though no proof was given of actual possession under it.

§ 667.³ Subject to the observance of the above rules, *ancient documents* are receivable as evidence that the transactions to which they relate actually occurred. And though they are usually spoken of as hearsay evidence of ancient possession, and, as such, are said to be admitted in exception to the general rule; yet they seem rather to be parts of the *res gestæ*, and therefore admissible as original evidence, on the principle already discussed.⁴ An ancient deed, which has nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead;⁵ and, if found in the proper custody, and corroborated by evidence of corresponding ancient or modern enjoyment, or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of property therein mentioned; because this is the usual course of such transactions. The residue of the transaction may be as unerringly inferred from the existence of genuine ancient documents, as the remainder of a statue may be made out from an existing *torso*, or a perfect skeleton from the fossil remains of a part.

¹ Duke of Bedford *v.* Lopes, 1838 (Ld. Denman).

² Doe *v.* Pulman, 1842. See, further, Clarkson *v.* Woodhouse, 1782 (Ld. Mansfield); Brett *v.* Beales, 1829 (Ld. Tenterden); Tisdall *v.* Parnell, 1863 (Ir.); Doe *v.* Passingham, 1826 (Burrough, J.); Raneliffe *v.* Parkyns, 1818 (Ld. Eldon); McKenire *v.* Fraser, 1803; Jackson

v. Blanshan, 1808 (Am.); Crowder *v.* Hopkins, 1843 (Am.); Jackson *v.* Luquere, 1825 (Am.); Jackson *v.* Lamb, 1827 (Am.); Barr *v.* Gratz, 1819 (Am.); Hewlett *v.* Cock, 1831 (Am.).

³ Gr. Ev. § 144, in great part.

⁴ Ante, §§ 583 et seq.

⁵ Ante, § 87.

AMERICAN NOTES.

Hearsay Concerning Ancient Possession. — Documents thirty years old not only dispense with proof of execution, but, so far as they purport to show the exercise of acts of ownership, are evidence of the existence of such acts. *Harlan v. Howard*, 79 Ky. 373 (1881); *Boston v. Richardson*, 105 Mass. 351 (1870); *Baeder v. Jennings*, 40 Fed. Rep. 199 (1889).

On an issue of ownership of a strip of beach, licenses of the claimant more than sixty years old, produced from the proper custody, purporting to authorize the erection of a fish-house upon the premises in question, are evidence in support of the licensor's title. *Boston v. Richardson*, 105 Mass. 351, 371 (1870). "The fourth ruling at the trial was, that there was not sufficient evidence to authorize the jury to find that the town had since the passage of the ordinance of 1647 gained any title to the demanded premises by disseisin.

"The demandants offered evidence tending to show that a fish box, eight or ten feet long by four or five feet wide, with a folding lid or table, upon which fish were sold, stood upon the premises as early as 1808, and thenceforward until 1824 or 1825, when the city of Boston removed it and put an engine-house in the same place, projecting partly over the dock, which remained until 1830. The demandants also offered the records of two orders of the selectmen of the town of Boston; one in 1761, granting to 'Mr. Blake, a fisherman,' upon his application, 'liberty to set up a fish-house at the end of Summer Street, near the Bull Tavern,' 'provided he pays one dollar per annum to the town as a consideration, for said privilege of a fish market;' and the other in 1803, by which 'Joseph Stevens is permitted to occupy the fish stall at the bottom of Summer Street, lately allowed to Robinson, who consents thereto.' and two of the selectmen 'were desired to direct the alterations in the stall which Mr. Stevens proposes to make.'

"These licenses were excluded, on the ground that no acts were proved to have been done under them. But we are of opinion that, at least when taken in connection with the evidence of the subsequent occupation of the premises for the purpose mentioned in them, they were admissible. Otherwise, as those acts would not be matter of record, and as the testimony of witnesses to facts which happened at so distant a period could hardly be obtained, it would be impossible to supply the proof required." *Boston v. Richardson*, 105 Mass. 351, 371 (1870). The court quote with approval from the opinion of Willes, J., in *Malcolmson v. O'Dea*, 10 H. L. Cas. 593, 614-616 (1863). "The proof of ancient possession is always attended with difficulty. Time has removed

the witnesses who could prove acts of ownership of their own personal knowledge, and resort must necessarily be had to written evidence. The rule is, that ancient documents, coming out of proper custody and purporting upon the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly, in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail. It may be a question, whether the absence of proof of enjoyment consistent with such documents goes to the admissibility or only to the weight of the evidence; probably the latter. 'We know of no case in which an ancient document, coming from a proper custody, and purporting to be an act of ownership, by way of lease or license over the property, in company with other evidence showing enjoyment consistent with such ownership, has been rejected upon the ground that the enjoyment could not be referred to the particular document in question.' " *Boston v. Richardson*, 105 Mass. 351, 371 (1870).

"The tenants also had a right to put in evidence, as a part of their chain of title, the various deeds of the persons who formerly, as they contended, were the owners of the Belcher portion of the property, and under whom they claimed. The partition and these deeds were evidence of acts of ownership on the part of the tenants' predecessors in the title, at and after the date of that partition in 1805, and before 1832; and we think they were properly admitted as such. They would furnish *prima facie* evidence, liable of course to be rebutted and disproved, but, in the absence of other evidence, they would raise a presumption of sufficient seisin in the grantors to enable them to convey, and, especially in transactions so ancient, would operate to vest the legal seisin in the grantees." *Floyd v. Tewksbury*, 129 Mass. 362 (1880).

A lease one hundred and eight years old may be read in evidence without proof of its execution. *Hewlett v. Cock*, 7 Wend. 371 (1831).

The exception has been extended so as to include ancient proprietors' records as evidence of the facts set forth in them. "Courts have felt obliged from necessity to depart from the strict rules of evidence in the admission of ancient writings, documents, books and records, to prove the existence of the facts they recite. The rule of evidence requiring the testimony of the lawful custodian of

books of record offered in evidence, that they are of the description claimed, before they are admissible, has repeatedly been relaxed in the case of ancient books of record of proprietors of land. In such instances, such books have been held to prove themselves. When ancient books, purporting to be records of such proprietary, contain obvious internal evidence of their own verity and there is no evidence of the present existence of the proprietary or of any person representing it, or any clerk or other person authorized to keep the records, they are admissible in evidence without proof of the legal organization of the proprietary, or of its subsequent meetings." *Goodwin v. Jack*, 62 Me. 414 (1872).

PROPER CUSTODY. — The ancient documents must be produced from such a natural custody as relieves them from suspicion. *Harlan v. Howard*, 79 Ky. 373 (1881).

Finding the counterpart of a lease one hundred and eight years old among the muniments of title of the lessor is sufficient. "Ancient writings, which are proved to have been found among deeds of evidences of land, may be given in evidence, although the execution cannot be proved; for it is hard to prove ancient things, and finding them in such a place, is a presumption that they were honestly and fairly obtained, and preserved for use, and are free from suspicion of dishonesty." *Hewlett v. Cock*, 7 Wend. 371 (1831).

CORROBORATION. — It has been widely held that some proof of actual possession or user under them should accompany and corroborate the statements set forth in the ancient documents themselves.

That possession under the ancient document is necessary, see *Clarke v. Courtney*, 5 Peters, 319, 344 (1831).

Subsequent occupation of the premises for the same purpose and under the same authority is a sufficient corroboration to authorize the admission of prior licenses of long standing. *Richardson v. Boston*, 105 Mass. 351, 371 (1870).

"Possession accompanying the deed is always sufficient, without other proof, but it is not indispensable." *Hewlett v. Cock*, 7 Wend. 371 (1831).

Other corroboration will suffice. In *Hewlett v. Cock* (ubi supra) the fact that the lessee and his assigns treated the land as leased was sufficient corroboration.

"It has been settled by the weight of authority that ancient deeds of conveyance of real estate are admissible without first requiring the party offering them to show acts of possession over the lands embraced by them. For until the court is made acquainted with the tenor of the instrument, the natural order of introducing the evidence would be reversed by requiring proof of corresponding possession.

The genuineness of such instruments may be shown by other facts as well as that of possession.

And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument where no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it." *Harlan &c. v. Howard &c.*, 79 Ky. 373 (1881).

CHAPTER VI.

DECLARATIONS BY DECEASED PERSONS WHICH ARE UNLIKELY
TO BE FALSE.

§ 668.¹ THE fourth of the six exceptions which we have seen² to exist to the general rule that hearsay evidence must be rejected, renders admissible *declarations made by persons since deceased under such circumstances that they are extremely unlikely to be false.*³ The regard which men usually pay to their own interests is considered a sufficient security against any wilful mis-statement, and affords also a reasonable inference that the declarations or entries were not made under any mistake of fact, or want of information on the part of the declarant. The danger of any fraud in the statement will be still less dreaded, if it be borne in mind, that the evidence is not *receivable till after the death* of the declarant, and that if the opponent can show that the statement was made with any sinister motive, it will at once be rejected. The ordinary tests of truth, afforded by the administration of an oath and by cross-examination, are certainly here wanting; but their place is in some measure supplied by the circumstances of the declarant. The inconveniences that would result from the exclusion of evidence, having such guarantees for its accuracy in fact and its freedom from fraud, are considered as, on the whole, much greater than any which are likely to be experienced from its admission.⁴

§ 669. The most common example of this species of evidence is furnished by "*declarations against interest.*" In order to render declarations against interest admissible as such, it must appear, either by proof or by presumption,⁵ that the declarant is

¹ Gr. Ev. § 148, in great part.

Lee, 1821 (Plumer, M.R.).

² Ante, § 607.

⁴ 1 Ph. Ev. 294.

³ Sussex Peer., 1844, H. L.;
Higham v. Ridgway, 1808; Short v.

⁵ Doe v. Michael, 1851; ante,
§ 198.

dead.¹ The mere fact that he has absconded abroad in consequence of a criminal charge, or that he is otherwise out of the power of the party to produce as a witness, will not be sufficient.² It has been expressly decided that, as regards declarations against *pecuniary* interest, it is "not necessary that the deceased person should have his own knowledge of the fact stated,—that, if the entry charged himself, the whole of it became admissible against all persons,—and that the absence of such knowledge went to the weight, and not to the admissibility, of the evidence."³ As regards declarations against *proprietary* interest, indeed, it is necessary, where the declarant had no personal knowledge, that he should have simultaneously declared his belief in the hearsay.⁴ Moreover, declarations against interest are admissible although such declarations were not contemporaneous with any acts.⁵ Such circumstances only affect the weight and not the admissibility of the evidence.

§ 670. It is now fully determined,⁶ first, that the statement or entry must have originally been against the actual pecuniary interest at that time of⁷ the person making it;⁸ and, secondly, that the interest must be of a *pecuniary* or *proprietary* nature,⁹ which latter term will include declarations as to the *status* (as *e.g.*, the legitimacy) of the declarant.¹⁰ Lord Chancellor Lyndhurst, in

¹ *Phillips v. Cole*, 1839 (Ld. Denman); *Spargo v. Brown*, 1829; *Smith v. Whittingham*, 1833. See ante, § 641, and post, § 703.

² *Stephen v. Gwenap*, 1831 (Alderson, J.).

³ See *Crease v. Barrett*, 1835; *Percival v. Nansen*, 1851. The contrary was (to adopt Ld. Denman's expression in *O'Connell v. The Queen*, 1844, H. L.) "taken for granted" formerly, and in the old cases of *Higham v. Ridgway*, 1808 (Bayley, J.); *Marks v. Lahee*, 1837 (Tindal, C.J., Park and Vaughan, JJ.); *Barker v. Ray*, 1826 (Ld. Eldon); *Short v. Lee*, 1821 (Plumer, M.R.). Indeed, in the *Sussex Peerage* case, 1844, H. L., it was so laid down (Lds. Denman and Brougham).

⁴ *Ld. Trimlestown v. Kemmis*, 1843, H. L.

⁵ *Doe v. Turford*, 1832.

⁶ It was long a matter of doubt in our Courts whether the absence of all interest to misrepresent, coupled with peculiar knowledge in the declarant, would not render his declarations admissible after his death. See *Glynn v. Bk. of England*, 1750 (Ld. Hardwicke); *Higham v. Ridgway*, 1808 (Le Blanc, J.); *Gleadow v. Atkin*, 1833 (Bayley, J.); *Roe v. Rawlings*, 1806 (Ld. Ellenborough); and *Daly v. Wilson*, 1842 (I.R.).

⁷ In *re Tollemache*, Ex parte Edwards, 1884, C. A.

⁸ *Berkeley Peer.*, 1811, H. L., cited and confirmed in *Sussex Peer.*, 1844, H. L.

⁹ *Sussex Peer.*, 1844, H. L., explained and acted upon by Ld. Denman in *Davis v. Lloyd*, 1844. See, also, *Smith v. Blakey*, 1867; *Massey v. Allen*, 1879.

¹⁰ In *re Perton*, *Pearson v. Att.-Gen.*, 1885.

the Sussex peerage case, observed, "It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them. Nor is it true, that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death. These are not correlative nor corresponding propositions."¹ Lord Brougham added, "To say, if a man should confess a felony for which he would be liable to prosecution, that therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced."²

§ 671. A declaration by a deceased person, who would, in the event of her late husband having died intestate, be entitled to a certain amount under a settlement, that he had left a will by which he had given her a less sum, is, however, against pecuniary interest, and therefore admissible.³ And, in any case, the courts will not weigh with nice scales the amount of the pecuniary interest possessed by the declarant, but will admit every entry which, at the time when it was made, *completely* charged the maker to any extent.⁴ An incomplete charge will, however, not be sufficient. Therefore, an entry in the following form, "April 4th.—A. came as a servant, to have for the half year 2*l*," was held to be inadmissible as a declaration against interest, it being merely a memorandum of an agreement, which must be supposed to have been made on fair terms, and was, consequently, as much in favour of the maker's interest as against it, since, if the master had to pay for the services, the servant had to perform them.⁵

§ 672. The term "declaration," both with regard to declarations against interest and declarations made in the course of duty or business,⁶ includes a mere *oral* statement, as well as a written memorandum.⁷ The former may indeed be entitled to less weight

¹ Sussex Peerage, 1844.

² Id. This case overrules Standen v. Standen, 1791.

³ Flood v. Russell, 1892 (Ir.).

⁴ Orrett v. Corser, 1855; Richards v. Gogarty, 1870 (Ir.).

⁵ R. v. Worth, 1843.

⁶ R. v. Buckley, 1873.

⁷ R. v. Birmingham, 1861. See

with the jury than the latter, but the law recognises no distinction between statements made by word of mouth, and those made in writing, except where the writing is by deed,¹ or is rendered necessary by some statute.

§ 673. It is further clear that the term “declaration,” as applied to declarations against interest, or in the ordinary course of business, embraces *all written statements*, whether made *at the time of the fact declared, or on a subsequent day*,² though the most frequent example of it is contained in entries in books of account. Where³ these are books of collectors of taxes, stewards, bailiffs, or receivers, which are subject to the inspection of others, and in which the entries are generally of money received, charging the party making them, they are clearly admissible.⁴ But *private books*, though exclusively retained within the custody of their owners, are also admissible; for their liability to be produced in courts of law on notice or subpœna, and the chance of their contents becoming known through accident, are deemed sufficient security against fraud.⁵ An entry, too, is not admissible, unless it either *charges the party making it* with the receipt of money on account of a third person, or else *acknowledges the payment of money* due to himself, and it is only considered as sufficiently against his interest to be brought within the exception, in the one or the other of these two events.⁶

§ 674. No valid objection can be taken to the admissibility of an entry, which charges the person making it with receiving money from another, on the ground that such entry forms only a part of a *general debtor and creditor account, the balance of which is in favour of the receiver*.⁷ The reasons for this are, first, that if an action were brought against the receiver by his employer, that part

Stapylton v. Clough, 1853; Fursdon v. Clogg, 1842; Sussex Peer., 1844, H. L. See, also, post, § 708. In Smith v. Blakey, 1867, Blackburn, J., said obiter, and citing no authority, that this proposition was “too broadly stated.”

¹ Bewley v. Atkinson, 1880 (Thesiger, L.J.).

² Doe v. Turford, 1832 (Parke, B.); Short v. Lee, 1821 (Plumer, M.R.).

³ Gr. Ev. § 150, in great part.

⁴ Barry v. Bebbington, 1792; Goss v. Watlington, 1821; Whitnash v. George, 1828.

⁵ Higham v. Ridgway, 1808 (Bayley, J.); Roe v. Rawlings, 1806 (Ld. Ellenborough); Middleton v. Melton, 1829.

⁶ See Foster v. M'Mahon, 1847 (Ir.).

⁷ Rowe v. Brenton, 1828; Williams v. Geaves, 1838 (Patteson, J.); R. v. Worth, 1843 (Coleridge, J.); Clark v. Wilmot, 1841.

of the account which charged the receiver would be evidence against him, while the entries which showed his discharge, though not absolutely inadmissible for him, would, as compared with the entries against his interest, be entitled to very little weight;¹ that in any case (and even if the law were not as just stated) the admission of the receipt of money would still be against his interest, as the balance in his favour would thereby be diminished to the extent of the sum admitted;² that a man is little likely to charge himself for the mere purpose of getting a discharge;³ and that, as almost all entries which are tendered in evidence as being declarations against interest are contained in accounts containing items on both sides, the objection, if allowed to prevail, would strike at the very root of the exception under consideration.⁴

§ 675. It is a question of some difficulty, and the authorities on the point are conflicting, as to whether an entry made by a party acknowledging the payment of money to himself, will be admissible as a declaration against interest, in cases where *such entry is the only evidence of the debt and charge of which it shows the subsequent liquidation*.

§ 676. Some years ago such entries were twice held to be inadmissible,⁵ but in three other cases (one of which is as recent as 1876), Lord Denman,⁶ Lord Wensleydale,⁷ and Sir George Jessel,⁸ appear to have admitted such entries. The modern view will, probably, ultimately prevail; for though while that part of an

¹ See 2 Smith, L. C. 286.

² See *Williams v. Geaves* (Ludlow, Serj., arguendo), 1838.

³ *Rowe v. Brenton*, 1828 (Little-dale, J.).

⁴ Per Ld. Tenterden, in *id.*

⁵ *Doe v. Vowles*, 1833 (Littledale, J.); *Doe v. Burton*, 1840 (Gurney, B.).

⁶ *R. v. Hendon* (an undated decision of Lord Denman's), cited arguendo in *Doe v. Burton*, 1840.

⁷ *R. v. Lower Heyford*, 1840, cited 2 Sm. L. C. 283. In this case Ld. Wensleydale, and, in that cited in the last note, Ld. Denman, expressly disapproved of *Doe v. Vowles*, 1833, each saying that he thought *Doe v. Vowles* contrary in principle to the well-known leading case of *Higham*

v. Ridgway, 1808. But *Higham v. Ridgway* scarcely furnishes a safe guide on the subject, for there it *was* proved by evidence aliunde that the service charged for in the account had in fact been performed; and although Ld. Ellenborough first lays down the general doctrine that "the evidence was admissible upon the broad principle on which receivers' books have been admitted,—namely, that the entry made was in prejudice of the party making it,"—he afterwards, in two different parts of his judgment, adverts to the fact that the work for which the charge was made was proved to have been done by other evidence: 10 East, 117, 119.

⁸ *Taylor v. Witham*, and *Witham v. Taylor*, 1876.

entry which is in the writer's own favour stands unconfirmed, suspicions may possibly be entertained that the whole statement is a fiction;¹ it is highly improbable that any tradesman would first enter a false claim on one side of his book, and then admit on the other that it had been satisfied. To require corroborative proof of the claim would, too, tend to embarrass the trial by raising collateral issues, while the very impossibility of obtaining such proof is often the sole cause which renders it necessary to have recourse to the entry at all. It on the whole seems, therefore, that the admission of such entries must, alike on the grounds of justice and expediency, be regarded as a less evil than their rejection.

§ 677. Entries may be received as evidence of *collateral and independent matters*, which, though forming part of a declaration against interest, are not in themselves against the interest of the declarant.² For instance, in a well-known leading case,³ to prove on what day a child was born, the book of the accoucheur, who had attended the mother in her confinement, was produced, and as his charge for such attendance on a day specified was marked in the book as *paid*, this entry was admitted as evidence of the *date* of the birth, Lord Ellenborough, observing, "It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged."³ Similarly in another case⁴ the entry in a book of a deceased attorney of charges paid for a lease there stated to have been drawn on a certain day, was held to be evidence that the lease was drawn on that day.

§ 678.⁵ In an action upon a joint and several promissory note for 300*l.*, a memorandum of a partial payment made by A., indorsed by the payee upon the note in these terms,—“Received of A. the sum of 280*l.* on account of the within note, *the 300*l.* having been originally advanced to C.*,”—was held, in an action by A. against B. “as a co-surety,” to be, after the death of the payee, evidence not only of the payment of the money, but of the

¹ 2 Sm. L. C. 283.

² Higham v. Ridgway, 1808.

³ *Id.*

⁴ Doe v. Robson, 1812. See, also, In the Goods of Thomas, 1871.

⁵ Gr. Ev. § 152, in great part.

fact that C. was the principal debtor; leaving the effect of such proof to be determined by the jury.¹

§ 679. In yet another case,² two entries were held admissible which had been made by a deceased clerk of plaintiff's attorney in the day-book of the office, by the first of which the clerk acknowledged the receipt of 100*l.* from his employer, for the purpose of making a tender to the defendant, while the second was as follows: "Re Colnaghi, attending Mr. Laheè; tendering him 100*l.* for each of the plates, and the etching of the Queen separately; when he declined to let me have same, and said he had no objection to deliver up the impressions, upon payment of the expenses of making them;"—although objection was taken to the admissibility of the second entry, on the ground that it did not charge the party making it, but rather discharged him, as showing that he had fulfilled his duty; that the second entry must be taken by itself, because the first did not prove the tender; and being so taken, there was nothing to show that the clerk did not tender his own money; in which case the entry contained nothing to charge him. And in a still earlier case³ it was held that where, to establish the existence of a customary payment, two entries in a parish book have been put in, the first of which stated the custom, and the second, which was written on the same page, was as follows:—"Received of Haworth, who this year disputed *this* our ancient custom, but afterwards paid it, 8*l.*," both entries were admissible, the latter as charging the parish officers with receipt of the money, the former as immediately preceding the latter, and being referred to in it.⁴

§ 680. It must not, however, be supposed that because a document contains entries against interest, it will be admissible in proof of *independent matters*, when the entries against interest do not refer to, or require to be read, in order to explain such matters, but such matters *appear as separate items unconnected with such entries*.⁵ For instance, if an account be rendered by a steward

¹ *Davies v. Humphreys*, 1840. See, also, *Percival v. Nanson*, 1851.

² *Marks v. Laheè*, 1837.

³ *Stead v. Heaton*, 1792. This case was said (Alderson, B., in *Knight v. Waterford*, 1840) to carry the prin-

ciple on which it proceeds to the extreme verge of the law. See, also, *May. of Exeter v. Warren*, 1844.

⁴ See *Musgrave v. Emmerson*, 1847.

⁵ Per *Ld. Lyndhurst*, in *Rudd v. Wright*, 1832. At one time doubts

containing on one side items charging himself with the receipt of moneys, and on the other side items discharging him by showing how the moneys received had been disbursed, the discharging entries will not be admissible, unless they are necessary to explain the charging entries, or are expressly referred to by them.¹ Accordingly where,² to show that former lords of the manor had been liable to pay poor-rates on the tithes, the accounts of a deceased steward were tendered in evidence, and on one side of these the steward acknowledged the receipt of rent for tithes from a tenant, and on the other side had made an entry in discharge of the former item, by allowing the tenant a certain sum for poor rates on the tithes, the second entry was rejected on the ground that it was not directly connected with the first item, though made about the same time.

§ 681.³ In order that declarations against interest should be admissible, it is not necessary⁴ that the declarant should have been competent, if living, to testify to the facts it asserts.⁵ Neither, as regards the *admissibility* of declarations, is it material that the matters stated therein are provable by living witnesses who might have been called.⁶ Moreover, no objection can be taken to an account, in which a deceased agent charges himself with the receipt of money, on the ground that it does not appear by the account itself for whom the sums were received; provided it can be shown *aliunde* that they were in fact collected for a third person.⁷

§ 682. Accounts will be received in evidence, as being declarations of a deceased person charging himself, if they were written by him either wholly⁸ or in part,⁹ though they were not signed; or if they were signed by him, though they were written by a

were unquestionably entertained on the subject. See *Bullen v. Michel*, 1816.

¹ *Doe v. Bevis*, 1849; *Whaley v. Carlisle*, 1866 (Ir.).

² *Knight v. Marquis of Waterford*, 1840 (Alderson, B.). The learned judge added that if the amount charged had been explicitly stated to be a sum less than that deducted on the other side of the account, it might possibly have been admissible, on the authority of *Stead v. Heaton*,

supra.

³ Gr. Ev. § 153, in part.

⁴ Formerly it was thought otherwise. See *Higham v. Ridgway*, 1808 (Bayley, J.).

⁵ *Gleadow v. Atkin*, 1833; *Short v. Lee*, 1821.

⁶ *Middleton v. Melton*, 1829 (Parke, J.); ante, § 641.

⁷ *Rowe v. Brenton*, 1828.

⁸ *Id.*

⁹ *Doe v. Colcombe*, 1841 (Coleridge, J.).

stranger.¹ So they will also be, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorised agent,² or if that fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in at an audit.³ Nor does it signify in such a case whether the party who actually wrote the accounts be alive or dead at the time of the trial, though, if he be alive, his non-production may be matter of observation.⁴ If, however, no proof can be given that the account was either written, or signed, or authorised, or adopted, by the deceased person made chargeable thereby, it cannot be received. Therefore, a rental, in which a deceased steward was debited with certain receipts, written by a party since dead, styling himself clerk to such steward, was not received as a declaration against the interest of the steward, no parol evidence having been given to show that he ever employed the writer to make the entries; and it was equally inadmissible as made against the interest of the clerk, because it did not purport to charge *him*.⁵ After the lapse of thirty years, the handwriting of an account need not be proved, provided the book containing it be produced from the proper custody.⁶

§ 683.⁷ Where the evidence consists of entries made by persons acting for others, as agents, stewards, or receivers, *some proof of such agency* is generally required, previously to their admission. Where, indeed, the office is *public* and must exist, the law will presume that a person who acts in it has been regularly appointed. But where it is merely *private*, preliminary and independent evidence must in general be adduced of its existence, and of the appointment of the particular agent or incumbent.⁸ Even the antiquity of the book containing the entry does not, per se, afford sufficient ground for dispensing with this preliminary proof.

¹ Doe v. Stacey, 1833 (Tindal, C.J.).

² Bradley v. James, 1853.

³ Doe v. Hawkins, 1841; Doe v. Mobbs, 1841; May, of Exeter v. Warren, 1844; Att.-Gen. v. Stephens, 1855 (Wood, V.-C.).

⁴ Doe v. Hawkins, 1841 (Patteson, J.).

⁵ Baron de Rutzen v. Farr, 1835.

⁶ Wynne v. Tyrwhitt, 1821; May, of Exeter v. Warren, 1844; Doe v. Michael, 1851; Att.-Gen v. Stephens, 1855.

⁷ Gr. Ev. § 154, in part.

⁸ Short v. Lee, 1821 (Plumer M.R.).

Therefore entries have been rejected for want of it, though they were apparently made as much as fifty, seventy, and in one case, even one hundred and sixty years before the trial.¹ Bayley, B., in rejecting an entry bearing date 1673, observed, "The character of the evidence must be established before the entry is read; you cannot read it to show the position of the party making it; that must be proved aliundè."² Sir Thomas Plumer, M.R., said, with reference to a book seventy years old, purporting to have been kept by a tithe collector named Beale, "If the writings of persons not invested with the proper characters were received, nothing could be more dangerous to property. Suppose that Beale was not the person authorised to collect the tithes, but nevertheless had for some purpose made these entries; then, if after his death the book purporting to be a collector's book was to be evidence to prove that he was collector, and his being collector was to prove the entries to be correct, the consequence would be, that the rights of the rector on the one hand, or those of the parishioners on the other, would be exposed to the greatest danger, and perhaps from the writings of a person having a contrary interest."³ If, however, ancient books come from the proper repository, slight proof of the official character of the writer will usually be sufficient to warrant their admission. If, too, such documents contain strong *internal* evidence of their actually being what they purport to be, they may, it seems, on that ground alone, be submitted to the jury.⁴

§ 684. Declarations against *proprietary interest* include statements made by persons while in possession of land, explanatory of the character of their possession. Such declarations, *if made in disparagement of the declarant's title*, are receivable, not only as original admissions against himself and all persons who claim title through him,⁵ but also as evidence for or against strangers.⁶

¹ Manby v. Curtis, 1815; Short v. Lee, 1821; Davies v. Morgan, 1831.

² Davies v. Morgan, 1831.

³ Short v. Lee, 1821.

⁴ Doe v. Thynne, 1808; Brune v. Thompson, 1841 (Ld. Denman); May. of Exeter v. Warren, 1844; Doe v. Michael, 1851; Att.-Gen. v. Stephens, 1855. See ante, § 612.

⁵ Ld. Trimlestown v. Kemmis.

1843, H. L.; Doe v. Pettett, 1821; Doe v. Austin, 1832. For American authorities, see West Cambridge v. Lexington, 1824; Little v. Libby, 1823; Rankin v. Tenbrook, 1837; Jackson v. Bard, 1809; Weidman v. Kohr, 1818; Giblehouse v. Strong, 1832; Davies v. Campbell, 1841; Crane v. Marshall, 1839.

⁶ Carne v. Nicoll, 1835; Doe v.

Whether in this latter event they are admissible in the lifetime of the declarant, or only in cases where his death can be proved, has not been distinctly decided. In most of the cases where the evidence has been received the declarant was dead;¹ but on two occasions, at least, the evidence was admitted, though the declarant was living.² These declarations can, it is said, only be receivable during the declarant's lifetime as being statements accompanying acts of possession, and as such constituting part of the *res gestæ*. This argument, however, proves too much, as it would let in all declarations of the occupier, whether in disparagement or in *support* of his title; an extension of the rule which (however consistent it may be with principle), is certainly not warranted by judicial decisions.³ Such declarations ought to be regarded as only receivable when the declarant is dead, but as then being good primary evidence;⁴ and as then admissible simply on the ground that they were made against the interest of a deceased declarant.⁵

§ 685. Possession is, however, *primâ facie* evidence of seisin in fee simple.⁶ Consequently, any declaration by a person in possession that he is tenant in tail, or for life, or for years, or by sufferance, as it makes strongly against his own interest, may safely be received in evidence, on account of its probable truth,⁷ whether such declaration be made verbally,⁸ or in writing,⁹ or by deed,¹⁰ or by will (even an unproved),¹¹ or in a statement of defence

Langfield, 1847; *Doe v. Jones*, 1808; *Davies v. Pierce*, 1787; *Doe v. Rickarby*, 1803; *Peaceable v. Watson*, 1811; *Doe v. Coulthred*, 1837; *Garland v. Cope*, 1848 (Ir.); *Mountnoy v. Collier*, 1853; *Gery v. Redman*, 1875.

¹ *Carne v. Nicoll*, 1835; *Doe v. Jones*, 1808; *Davies v. Pierce*, 1787; *Peaceable v. Watson*, 1811; *Doe v. Coulthred*, 1837; *Doe v. Pettett*, 1821.

² *Walker v. Broadstock*, 1795 (Thomson, B.); *Doe v. Rickarby*, 1803 (Ld. Alvanley). In *Papendick v. Bridgwater*, 1855, *Walker v. Broadstock* was denied to be law.

³ See *Doe v. Wainwright*, 1838.

⁴ *Doe v. Langfield*, 1847 (Parke, B.).

⁵ In *Phillips v. Cole*, 1839, Ld. Denman, in pronouncing the judg-

ment of the court, says: "It is clear that declarations of third persons alive, in the absence of any community of interest, are not to be received to affect the title or interests of other persons, *merely* because they are against the interests of those who make them."

⁶ *Ante*, § 123.

⁷ *Chambers v. Bernasconi*, 1831 (Ld. Lyndhurst); *Peaceable v. Watson*, 1811 (Sir J. Mansfield, C.J.); *Crease v. Barrett*, 1835 (Parke, B.); *Doe v. Langfield*, 1847.

⁸ *Carne v. Nicoll*, 1835; *Baron de Bode's case*, 1845; *R. v. Birmingham*, 1861; *R. v. Exeter*, 1869.

⁹ *Doe v. Jones*, 1808; *R. v. Exeter*, 1869.

¹⁰ *Doe v. Coulthred*, 1837; *Garland v. Cope*, 1848 (Ir.); *Sly v. Sly*, 1877.

¹¹ *O'Sullivan v. Burke*, 1875 (Ir.).

to an action.¹ But it must relate to matters, either within the declarant's own knowledge, or on which he has himself formed an opinion; and therefore a statement of defence, narrating what the declarant has heard *another person state* respecting his title, is not admissible to defeat his estate—at least if he does not add that he believes such statement to be true.²

§ 686. It is difficult to fix with precision how far declarations against interest are evidence of the facts contained in them. They have been received to show the name of the landlord under whom,³ and the identity of the will under which,⁴ the declarant held; the amount of rent that was paid;⁵ the fact of the payment of rent;⁶ the extent of the tenement that was occupied;⁷ and the fact that it was freehold and not copyhold.⁸ Indeed, the courts seem now inclined to admit such declarations not only as proof of the interest which the declarant enjoyed in the premises, but as evidence of any fact which is not foreign to the statement against interest, and which forms substantially a part of it.⁹ In all cases in which it is sought to give evidence of a declaration on the ground that it was a *declaration against* proprietary interest, it must, however, be proved that the declarant was actually in possession of the land in question; since otherwise his declaration that he has a limited interest therein may be regarded in the light rather of a statement in his own favour than of one against his interest.¹⁰ Still, slight evidence on this head will suffice.¹¹ Therefore, where a person was seen felling timber in a wood, this act of his—though probably he was in fact a mere labourer—was held to be a sufficient assertion of ownership to raise a presumption that he was possessed of the fee, and, consequently, to let in any statement made by him as to who was the actual proprietor.¹²

§ 687. In applying the rule that declarations *against proprietary*

¹ *Ld. Trimlestown v. Kemmis*, 1843, H. L.

² *Ld. Trimlestown v. Kemmis*, 1843, H. L., by the Lds., confirming the unanimous opinion of the judges.

³ *Peaceable v. Watson*, 1811; *Holloway v. Rakes*, 1772, cited by Buller, J., in *Davies v. Pierce*, 1787; *Doe v. Green*, 1820.

⁴ *Sly v. Sly*, 1877.

⁵ *R. v. Birmingham*, 1861.

⁶ *R. v. Exeter*, 1869.

⁷ *Mountnoy v. Collier*, 1853.

⁸ *Doe v. Jones*, 1808.

⁹ *R. v. Birmingham*, 1861.

¹⁰ See *Crease v. Barrett*, 1835.

¹¹ *La Touche v. Hutton*, 1875 (Ir.).

¹² *Doe v. Arkwright*, 1833 (Parke, J.).

interest are admissible, care must be taken to distinguish between statements made by an occupier of land in disparagement of his own title, and such declarations as merely go to abridge or incumber the property itself. The former are receivable, but the latter will be rejected. For instance, a statement by an occupier that he is only tenant for life, will, after his death, be admissible evidence against a stranger; but an admission by him that property was intersected by a public highway, or that a neighbour had an easement over it, or that he was not entitled to common of pasture in respect of it, will only bind himself and those who claim under him, and will not be admissible as against his landlord or a stranger.¹ The grounds for this distinction are obvious. It is scarcely possible to imagine any inducement which will lead a person possessed of premises in fee to admit that he is only a tenant. But many reasons might induce a tenant to acknowledge the existence of an easement or a highway,—especially where it was either not inconvenient, or even absolutely beneficial to him; ² a tenant, about to remove from one farm to another, might, for example, readily feel an interest in denying the existence of rights attached to the farm he was leaving, with the view of increasing the value of those which belonged to that which he was entering.³

§ 688. Entries contained in the *books of deceased rectors or vicars* have long been admitted as evidence *in favour of their successors*.⁴ The admissibility of this class of entries is differently viewed. Some persons regard it as altogether anomalous.⁵ Others look upon it as justified by the same principle as makes the rule which admits old leases, rent-rolls, surveys, &c., admissible.⁶ Others, again, consider that it falls within the same principle, viz., the extreme improbability of falsehood, which renders declarations against interest admissible evidence. At any rate ⁷ “it is now the settled law of the land. *It is not to be presumed, that a person,*

¹ *R. v. Bliss*, 1837; *Scholes v. Chadwick*, 1843 (Cresswell, J.); *Tickle v. Brown*, 1836 (Patteson, J.); *Papendick v. Bridgwater*, 1855.

² See *R. v. Bliss*, 1837 (Ld. Denman); *Daniel v. North*, 1809 (Le Blanc, J.).

³ *Papendick v. Bridgwater*, 1855

(Erle, J.).

⁴ See *Daly v. Wilson*, 1842 (Ir.); *Young v. Clare Hall*, 1851.

⁵ *Outram v. Morewood*, 1793 (Ld. Kenyon).

⁶ *Stobart v. Dryden*, 1836 (Parke, B.).

⁷ 1 Ph. Ev. 308, 309.

having a temporary interest only, will insert a falsehood in his book, from which he can derive no advantage."¹ The rule extends to admit the books of ecclesiastical corporations aggregate,² and, as it would seem, those also of lay impropiators in fee. With regard, however, to these last, it would certainly be open to considerable suspicion, since a lay impropiator in fee, having a permanent interest to advance, might possibly be induced to make evidence for his heirs.³

§ 689. Though, however, the law admits such entries by deceased persons in ecclesiastical books as evidence, juries will do well not to place implicit reliance on them. Moreover, although general observations have sometimes been made which appear to authorise the admission of any kind of statement contained in such books, they must, nevertheless, be rejected unless the entries contain receipts of money or ecclesiastical dues, or are, in other respects, apparently prejudicial to the pecuniary or proprietary interests of the makers.⁴ And further, as in other cases, proof will be required that the writer was authorised to receive the money stated, and that he is actually dead; and that the document has come from the proper custody.⁵

§ 690. The improbability of falsehood is again probably the principle⁶ upon which the *indorsement* by the payee of the *payment of interest*, or of *part payment* of the principal, on a bond, bill of exchange, or other negotiable security, might, under the old law, be given in evidence by *his representatives* after his death, in order to bar the Statute of Limitations, or to rebut the presumption of payment that would otherwise have arisen from lapse of time. Accordingly, where such indorsement was shown to have been made before the creditor's remedy was impaired by lapse of time, it was admissible evidence of an acknowledgment;⁷ if after that period, it was rejected.⁸ As to how the time at which the indorsement

¹ *Short v. Lee*, 1821 (Sir T. Plummer, M.R.).

² 1 Ph. Ev. 476—479.

³ *Id.* 479, 480, and cases there cited.

⁴ 1 Ph. Ev. 303; *Ward v. Pomfret*, 1832.

⁵ *Gresl. Ev.* 224; *Carrington v. Jones*, 1824; *Perigal v. Nicholson*,

1810.

⁶ But at least one eminent writer upon the law of evidence treats this class of cases in connection with entries made in the course of business: 1 Ph. Ev. 330—335.

⁷ *Searle v. Ld. Barrington*, 1728; *Bosworth v. Cotchett*, 1824.

⁸ *Newbould v. Smith*, 1889, H. L.;

was made can be proved is a point upon which much contrariety of opinion has prevailed.¹

§ 691. Now, however, so far as *notes*, *bills*, and other writings subject to the operation of the Statute of Limitations,² are concerned, Lord Tenterden's Act³ enacts, that "no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the said statute."⁴ An attempt was once made in an action by the executors of the payee of a promissory note, to extend this salutary provision beyond its legitimate limits. The plaintiffs, to defeat the Statute of Limitations, having tendered in evidence a book, in which the maker of the note had himself, by the direction of the testator, entered two payments of interest, as having been made to the testator by the defendant within the last six years, they were objected to, on one ground, that their receipt in evidence would violate the spirit, if not the words, of the enactment just cited. But the objection was overruled.⁵

§ 692. With respect, moreover, to *bonds* and other *specialties*, a modern statute⁶ has rendered nugatory the old doctrine of presumption of payment from lapse of time generally, by enacting that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognisance, &c., shall be commenced and sued within twenty years after the cause of such actions or suits; though the Act in question contains⁷ a proviso, that, if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon,⁸ the person entitled to such action may bring it for the

Turner v. Crisp, 1728; Glynn v. Bk. of England, 1750; Briggs v. Wilson, 1853.

¹ See cases referred to, post, §§ 693—696.

² 21 J. 1, c. 16, ("The Limitation Act, 1623").

³ 9 G. 4, c. 14, § 3.

⁴ As to the Irish Law, see 16 & 17 V. c. 113, §§ 20—24.

⁵ Bradley v. James, 1853.

⁶ 3 & 4 W. 4, c. 42, § 3.

⁷ In § 5, as to which see post, §§ 1090, 1091.

⁸ In Roddam v. Morley, 1857, payment of interest on a bond by the

C. VI.] INDORSEMENT OF PART PAYMENT ON SPECIALTIES.

money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid; and the plaintiff may, by way of reply, state such acknowledgment, and that such action was brought within the time aforesaid in answer to a plea of the statute.¹ The Act contains, however, no clause corresponding with the provision in § 3 of Lord Tenterden's Act, which has just been set out. It therefore seems clear that,—provided the point be properly raised by the pleadings,—the acknowledgment of the debt afforded by the payment of interest or part payment of principal may, in the case of bonds and other specialties, be still proved in the same manner as formerly; that is, by producing the document and showing that it bears indorsements of such payments, even though these indorsements were written or adopted by the creditor himself, through whom the plaintiff claims. The only difference between the old and new law is, that, whereas this evidence was formerly admissible in answer to a plea of payment, it is now received in support of a reply setting up an acknowledgment by the defendant, where the original demand has been met by a plea of the statute.

§ 693. It consequently may still become important to determine to what extent and in what manner it is necessary to adduce proof as to the time when an indorsement tendered in evidence to prove payment of interest or part payment of principal was written. Now, the whole system of admitting such indorsements in favour of parties *in privity* with the persons making them, is an anomaly which cannot be supported by any of the reasons whereon the admissibility of rectors' books is made to rest,² and which, so far as regards parol instruments, has been expressly rejected by the Legislature.³ And such indorsements are only admissible on the highly technical ground that they were, at the time they were made, *entries against*

tenant for life of certain land under the will of the obligor, was held to prevent this statute from barring the action against the heirs and devisees in remainder, after the expiration of twenty years from the time of the bond becoming due. See *Pears v.*

Laing, 1871 (Bacon, V.-C.). But see *Coope v. Cresswell*, 1866; and *Dickenson v. Teasdale*, 1862.

¹ As to Irish Law, see 16 & 17 V. c. 113, §§ 20—24.

² Ante, § 688.

³ 9 Geo. 4, c. 14, § 3.

the interest of the person making them, since his right was at that time unaffected by any Statute of Limitations. Under these circumstances it is not unreasonable to contend, that the courts should require strict proof of the time when the indorsements were really made, before admitting them in evidence. In ordinary cases, the law may safely presume that a document was written at the time it bears date. An exception to this general rule was recognized,¹ under the old law of bankruptcy, in cases where a note signed by a bankrupt was put in by his assignees to support the petitioning creditor's debt, and it was required that the date of the instrument should be *proved*. The grounds applicable in this case would appear to apply equally to the indorsements under discussion,² which, if really made *within* twenty years from the date of the bond, are received (because being in such case against the interest of the obligee, they are presumed to be true); but, if made *beyond* the twenty years, are rejected (because, after the lapse of that time, it would be so obviously to the advantage of the obligee to revive, by their means, the remedy barred by the statute). It is as easy to fabricate a date as to fabricate an indorsement, of which the date forms part, and it would be a strange mode of checking such fraudulent practices to say to an obligee, "Your remedy on the bond is barred by the statute, and therefore if you now indorse upon it any admission that you have received some interest from the obligor, no credit, after your death, will be given to such admission; but carry on your deceit one step further, and add to your indorsement a date, which will give it the semblance of having been made while your remedy was unimpaired, and then, at your death, your representatives may recover against the obligor." For these reasons it is submitted that evidence outside the instrument itself may reasonably be required. Indeed, to throw on a defendant the burthen of proving negatively that an indorsement on an instrument was not written on the day of the date, is in fact to shut the door upon all inquiry into the matter; because, as the note continued in the hands of the payee or his representatives, it was

¹ Ante, § 169. See, also, another exception noticed ante, §§ 169, 582.

² See *Potez v. Glossop*, 1848 (Parke, B.).

scarcely possible for the maker to ascertain at what time any indorsement was written upon it.

§ 694. The authorities cannot be said, however, to lay down any decisive rule on the point.¹ A case in the House of Lords² is usually cited³ as an authority against the view above contended for. But that case is not reported, and is noticed so shortly by text writers⁴ that the grounds of the decision cannot be ascertained. In another,⁵ extrinsic evidence *was* apparently given of the time when the indorsements were made, though only one reporter (Mr. Brown) mentions it;⁶ and he in but a loose way. In a third case,⁷ in addition to an indorsement signed by the obligee, a witness was called, who proved actual payment of the interest. In yet another,⁸ the payment of interest by the obligor to a stranger was proved; and many circumstances concurred to show that the indorsement relied upon by the plaintiffs was written on or about its alleged date, and, moreover, it signified little when it was written, as it was equally against the interest of the obligee at all times.⁹

§ 695. The strongest case against the view above contended for is a *Nisi Prius* ruling¹⁰ in which an indorsement upon a promissory note of the receipt of interest thereon (dated previously to the statute) was admitted without any extrinsic proof of the time when it was actually written; the judge observing, that, "in the absence of all evidence to the contrary, he should assume that it was written at the time it bore date." This case has been cited with approbation by the Court of Common Pleas,¹¹ and by Lord Justice Turner on a more recent occasion,¹² as supporting the general doctrine that documents are presumed to have been written at the time when they bear date.

§ 696. The view taken in the present work that evidence of date,

¹ Per Bayley, B., in *Gleadow v. Atkin*, 1833, stating the result of his own researches.

² *Bosworth v. Cotchett*, 1824, H. L.

³ Per Vaughan, B., in *Gleadow v. Atkin*, 1833. His lordship was counsel in *Bosworth v. Cotchett*, 1824.

⁴ 1 Ph. Ev. 333; 3 St. Ev. 824. In this last work the case is cited as *Parr v. Cotchett*.

⁵ *Searle v. Lord Barrington*, 1728.

⁶ 3 Br. P. C. 594, where the reporter says that "other circumstantial evidence" was given to prove that the bond had not been satisfied.

⁷ *Sanders v. Meredith*, 1828.

⁸ *Gleadow v. Atkin*, 1833.

⁹ See per Bayley, B., *id.*

¹⁰ *Smith v. Battens*, 1834 (Taunton, J.).

¹¹ In *Anderson v. Weston*, 1848.

¹² *Briggs v. Wilson*, 1853.

other than that afforded by the instrument itself, must be given, is, however, supported by the language of Lord Ellenborough,¹ where, in refusing to admit in evidence a certain indorsement, the date of which was not proved, but which displaced evidence already given on the other side, his lordship said, "I think you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. * * *

If such indorsements were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest."

§ 696A. Perhaps the safest rule that can be laid down on this subject is, that if the indorsement *appear by its date* to have been written within the twenty years, the question may be left to the jury, under all the circumstances of the case, whether it were *really* so written;² the law raising no presumption either way. In equity, however, the fact is one for the judge to determine.³

¹ *Rose v. Bryant*, 1809.

³ See *Newbould v. Smith*, 1889,

² See per Vaughan, B., in *Gleadow v. Atkin*, 1833. H. L.

AMERICAN NOTES.

Declarations against Interest. — A well established exception to the rule excluding hearsay is that which admits as evidence of the facts therein stated, declarations of a deceased person when made in derogation of his pecuniary or proprietary interest.

Entries by a deceased agent of the receipt of rent from a tenant are evidence of the occupation of the demised premises by the tenant. *Jones v. Howard*, 3 All. 223 (1861).

A receipt given by a sheriff for money paid him by a judgment debtor to redeem land sold on execution is competent evidence of the fact, date, amount and parties to the payment, not only as an entry in the course of official business, but as a declaration against interest. "The receipt was admissible on another ground. The officer thereby charged himself with the money, and rendered himself accountable for it to the creditor. It was an admission against his interest, made in respect to a matter pertaining to his official duty. Written memoranda, made under such circumstances, may reasonably be assumed to be truthful, and are evidence after the death of the party who made them, as well of the fact against his interest, as of the other incidental and collateral facts and circumstances mentioned, and are admissible irrespective of the fact whether any privity exists between the person who made them and the party against whom they are offered." *Livingston v. Arnoux*, 56 N. Y. 507, 519 (1874).

So of a sheriff's receipt for the purchase-money of a lot recited to have been sold some three years before. "Upon the same principle and for the same reason, the receipt of the sheriff for the purchase-money, although made long after the occurrence of the transaction, and after he was out of office, was admissible, and ought to have been allowed by the Court to go to the jury as evidence. Declarations of this character are received in consequence of the death of the party making them. They embrace not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day. To render them admissible, it must appear that the declarant is deceased, that he possessed competent knowledge of the facts, or that it was his duty to know them, and the declarations were at variance with his interests." *Field v. Boynton*, 33 Ga. 239 (1862).

In an action between third parties, to show the deposit of money in the banking establishment of Bassett & Bassett, an entry on their books in the handwriting of a deceased clerk showing the receipt of certain deposits is competent. *Heidenheimer v. Johnson*, 76 Tex. 200 (1890). "In connection with the entry offered in

this case, it was proved that the entry was in the handwriting of one Robertson, a bookkeeper for Bassett & Bassett, who was then dead; and also that Jefferson Bassett, of the firm of Bassett & Bassett, was also dead. It appeared in evidence that the other member of the firm was not dead, but no objection was made to the evidence upon that ground. It did not appear that he had any knowledge of the transaction, and if such objection had been urged it would probably have been shown that he took no part in the management of the business of the firm and knew nothing of its details. The effect of the entry was to charge the firm of Bassett & Bassett with the sum of \$5200, and was clearly against their interest."

On the question of the nature of a possession of certain premises, evidence is competent that a deceased tenant charged himself, in favor of the demandant's title, with the proceeds of timber cut.

"Of the same nature, and of additional force upon another ground, are the entries in his books, in which he charges himself, as in favor of those parties, with the avails of the timber cut from the land; because such a charge is, for this additional cause, against his interest, rendering him accountable for a sum of money.

The admissibility of entries made against the interest of the party making them at the time, as evidence between other parties, upon the ground of their being against such interest, is established by many cases in which the principle has been discussed and applied." *Rand v. Dodge*, 17 N. H. 343, 360 (1845).

A receipt by an attorney for money paid in settlement of a claim is evidence in a suit between third parties of the payment of the money. *Sherman v. Crosby*, 11 John. 70 (1814). So a guardian may put in receipts of persons to whom money has been paid by him as *prima facie* evidence of payment. "It cannot be expected, and never is required, that for money charged in the account of a guardian or administrator, he shall be held to the trouble and expense of charging the estate with a multitude of witnesses." *Shearman v. Akins*, 4 Pick. 282, 293 (1826).

Declarations by a deceased owner of land to the effect that his wife had "sold all the property out of his hands," under a power of attorney given her for another purpose but that they had compromised the matter, are relevant as between third parties, because against the proprietary interest of the declarant. *Bowen v. Chase*, 98 U. S. 254 (1878).

So of a declaration by a tenant that her interest is for life. *Lamar v. Pearre*, 90 Ga. 377 (1892).

A declaration of a deceased husband that he had cancelled an antenuptial agreement with his present wife is admissible in an action between her and a third party as being against interest,

because tending to reduce the amount of property over which the declarant had disposition and control. *Hosford v. Rowe*, 41 Minn. 245 (1889).

So a party's admission of a debt is competent evidence between third persons. "A declaration, though made by a stranger to the suit, may sometimes be used when the fact which it tends to establish is relevant to the case, and the declaration is against the interest of the party making it, and he is dead. Men do not falsely admit debts against themselves; and it is this presumption which induces the law to admit such a declaration." *Bartlett v. Patton*, 33 W. Va. 71, 82 (1889).

Where the plaintiff's deceased husband had entered on a cash-book the receipt of rent from the defendant, it was held that the declaration was admissible as against interest though the effect of admitting the evidence was highly favorable to the plaintiff. "I think it very clear that the entries in question are *prima facie* entries made by Mr. Turner against his interest, and so admissible, whatever value they may be." *Turner v. Dewan*, 41 Q. B. U. C. 361 (1877). The statement by A., an insolvent debtor, that B. is not his partner, is against A.'s pecuniary interest, as it puts the entire burden of the indebtedness upon himself. Such a declaration is therefore admissible between third parties. "It is an established rule of evidence, that while, in ordinary cases, the mere declarations of a person as to a particular fact are not evidence of that fact, being regarded as hearsay; yet declarations made by a person which are at variance with his pecuniary or proprietary interest, are admissible in evidence of their own truth, under certain circumstances. These conditions are, that the declarant possessed competent knowledge of the facts, and is deceased at the time his declarations are proposed to be proved. The absence of any motive of a pecuniary nature, which would tempt him to falsehood, creates a strong and intrinsic probability of the truth of his declaration; and it is, therefore, admitted as secondary evidence, after the death of the declarant, being the best which the nature of the case will, under the peculiar circumstances, permit." *Humes v. O'Bryan*, 74 Ala. 64, 78 (1883).

To prove the existence of a debt between third parties, the declaration of the alleged debtor that he owed it is competent. "The declarations were made by a man, upon the subject in controversy, against his interest, and when he could have no conceivable interest to declare that which was not true." *Peace v. Jenkins*, 10 Ired. 355 (1849); *Swan v. Morgan*, 88 Hun, 378 (1895).

So to prove payments of money to A., the receipt of his deceased attorney acknowledging such payments are admissible, on an action between third parties, to prove the fact and dates of payment.

Taylor v. Gould, 57 Pa. St. 152 (1868). "The objection is that it was hearsay evidence. But it had been proved that the attorney was dead. If there is anything settled, it is that the rule excluding hearsay evidence does not apply to oral or written declarations of deceased persons made against their interest." *Lowry v. Moss*, 1 Strob. 63 (1846).

To prove the purchase by B. of A.'s one-half interest in certain property, entries made by showing the receipt of the money and other facts relating to the transaction, are, together with policies of insurance taken out by him on the property, competent in a suit between third parties. "While the general rule is, that the declarations of a person, as to a transaction with another, being regarded as hearsay, do not bind a third person, whose rights are involved, such declarations, when contrary to the pecuniary or proprietary interest of the declarant, and he is deceased, are competent evidence against third persons, though their rights may be affected. The entries, and the representations in the policies as to the ownership, were declarations of H. C. Hart, against his proprietary and pecuniary interests, showing that he had sold an interest and received payment, and were relevant to the issue of adverse possession." *Hart v. Kendall*, 82 Ala. 144 (1886).

BENEFICIAL DECLARATIONS AGAINST INTEREST. — It frequently happens that a declaration apparently clearly against the interest of the declarant, when made, is really either at the time, or later, highly beneficial.

The general rule under such circumstances is, that the declaration is admissible if *prima facie* against the interest of the declarant, even if, in certain contingencies, to his advantage.

Still, where a deceased person had signed and placed among his own papers what purported to be a receipt signed by himself, acknowledging the receipt of \$48 as interest on £300, it was held liable to the objection of manufacturing evidence in his own favor, in a suit involving the question whether this £300 was a loan or the purchase-money of an annuity. *Ganton v. Size*, 22 Q. B. U. C. 473 (1863). The court say: — "It contains an admission to the extent of £12 against the maker, but it contains also an admission of £300 directly in his favour, so that it is by mere pecuniary computation twenty-five times more in his favour than it is against him; and to say that this is an admission against interest is to read the authorities to which we have been referred backward, for nothing can be more unlike the entry of forty years' standing made by so disinterested a party as was the case in *Higham v. Ridgway*, or more unlike the entry of nearly thirty years so completely against the maker's interest as was the case in *Gleadow v. Atkin*, than this memorandum made by the person who only could be directly benefited by it, and made so very shortly before litigation did take

place upon it." *Ibid.* To the same effect. *Confederation Life Ass'n. of Canada v. O'Donnell*, 13 Can. Supreme Ct. 218, 225 (1886).

It has been found necessary to alter the rule admitting beneficial declarations *prima facie* against interest in at least one particular. Where the effect of endorsing the receipt of money upon a bill of exchange, promissory note, bond or other specialty would, if made at a certain time, operate to remove the bar of the statute of limitations, it has been held that the endorsement, though *prima facie* against the interest of the declarant, is in reality so greatly and obviously in his favor as to warrant the courts in requiring that it should be affirmatively shown by evidence *dehors* the endorsement itself that it was made at a time when it actually was against the interest of the declarant to make it. *Roseboom v. Billington*, 17 Johns. 182 (1819); *Beatty v. Clement*, 12 La. Ann. 82 (1857).

Where the endorsement must have been made before the running of the statute, it is competent. "The endorsement was then clearly against his interest, furnishing proof that he had received part of the contents of the note. This never could have been done, if the sum endorsed had not been paid." *Coffin v. Bucknam*, 12 Me. 471 (1835); *Beatty v. Clement*, 12 La. Ann. 82 (1857); *Addams v. Seitzinger*, 1 W. & S. 243 (1841).

"With this qualification, such evidence cannot operate injuriously; for it is not to be supposed that a creditor could so far mistake his interest as to sacrifice a part of his debt to save the residue, when no part of it was in danger." *Addams v. Seitzinger*, 1 W. & S. (Pa.) 243 (1841).

The rule as to endorsements upon specialties was statutory in England, 9 Geo. IV., Ch. 14, § 3. Similar statutes have been enacted in many of the United states.

The same rule has been applied to an open account. Where the account sued on would be barred by the statute of limitations, unless the bar was removed by partial payments, the courts refuse to receive entries of such payments as credits by a deceased partner upon the firm books as sufficient evidence of the payment. *Libby v. Brown*, 78 Me. 492 (1886); *Hancock v. Cook*, 18 Pick. 30 (1836).

DECLARANT MUST BE DEAD. — The supreme court of Connecticut, in excluding declarations of a living person made against his then existing interest, say: — "These declarations are from a person, not a party, or a witness, and who might have been called as a witness. The general rule is, that if the party whose declarations are offered, is living, and can be a witness, his declarations are not evidence." *Fitch v. Chapman*, 10 Conn. 8 (1833).

"If these declarations were offered as the declarations of deceased persons, while occupying the premises, they would have

been therefore admissible. On the other hand, if they were offered as the declarations of persons now alive, they ought to be rejected." *Currier v. Gale*, 14 Gray (Mass.) 504 (1860); *Lowry v. Moss*, 1 Strob. 63 (1846); *Trammell v. Hudmon*, 78 Ala. 222 (1884).

But it has been held that where the declarant is a firm consisting of two persons, and the only one familiar with the business is deceased, the evidence is competent, in the absence of objection on that specific ground. *Heidenheimer v. Johnson*, 76 Tex. 200 (1890).

The suggestion has been made that these declarations are received from the necessity of the case, the declarant being dead.

"The declaration made by Worthington — that Hudmon had paid him all he owed, and that nothing remained due — although competent as an admission against the defendant, was not binding on a third person whose rights might be affected by it. Such declarations, although made against interest, are regarded as mere hearsay, except when it is shown that the declarant is since deceased, and then they are admitted only on the principle, that they constitute the best evidence of which the nature of the case will admit." *Trammell v. Hudmon*, 78 Ala. 222 (1884).

NATURE OF THE INTEREST. — The interest of the declarant must, as in England, be pecuniary or proprietary.

A power to dispose of property by will is regarded as a proprietary interest, and declarations tending to reduce the amount are within the rule. *Hosford v. Rowe*, 41 Minn. 245 (1889).

A mere receipt by a bailee for certain bonds which charges him, if at all, only for gross negligence in their custody, is not, being "contingent and improbable," a declaration against interest. *Tate v. Tate*, 75 Va. 522, 532 (1881).

But a statement by A., a person since deceased, that certain property in his possession is owned by B. is competent. *Walker v. Marseilles*, 70 Miss. 283 (1892).

Interest other than proprietary or pecuniary is not within the scope of the rule. A statement against the social or moral interest of the declarant is not competent.

On an indictment for murder, declarations by the deceased in favor of the accused, not made *in articulo mortis* or admissible as dying declarations, are not admissible for the accused, as declarations against interest. "The record shows that this testimony was sought to be introduced as containing the dying declaration of the deceased; but this proposition is so palpably indefensible, that it is abandoned here, and its attempted introduction sought to be justified on the ground that they were declarations made against the declarant's interest, and therefore admissible here, as in civil proceedings. This doctrine has never received the sanction of any

court, so far as we are advised, nor does the able and acute counsel offer any support derived from reason. We cannot see the slightest analogy between declarations made against interest by a suitor in a civil proceeding and declarations by a slain man, not made in *articulo mortis* under a sense of impending dissolution, and after an abandonment of all hope by the declarant. How any declaration can be said to be against the interest of a man already passed into the other world, and beyond the reach of every earthly tribunal and all earthly power, is wholly incomprehensible by us." *Helm v. State*, 67 Miss. 562, 572 (1890).

A statement by a person, "on his death bed," that he had killed the deceased is not admissible on behalf of the accused. "It was but hearsay." *West v. State*, 76 Ala. 98 (1884).

A., when accused of larceny, cannot prove by a witness present that B. admitted having stolen part of the goods. "The court would not admit it — saying it was no more than hearsay. If a person other than the defendant had stolen the goods, it was undoubtedly competent to the defendant to prove the fact, in exculpation of himself — but not by the mode of proof now offered." *Com. v. Chabcock*, 1 Mass. 143 (1804).

It has, however, on the contrary, been held that a declaration by an offender that he has committed a serious criminal offence, will be admitted as evidence of that fact in an action between third parties. *Coleman v. Frazier*, 4 Rich. (S. C.) 146 (1850). "I think it is true that a declaration, made by the party who does the act, as in this case stealing the letter containing the money, is admissible. It is very true that the rule that, where an entry or declaration, made by a deceased person, is against the interest of the party making it, it is admissible as evidence, was qualified by *Gilchrist & King v. Martin & West* (Bail. Eq. 492), and was restricted to cases where there was no interest to falsify the fact that it was made against the interest of the person making it, and that the entry or declaration was so ancient as to preclude suspicion that it was manufactured for the occasion. Under it alone, therefore, this declaration would not be admissible. But when it is remembered that this is not of a matter of business, like those spoken of in that case, but was a criminal act, of which none could be so cognizant as the party, I think a reason will be found for its admission arising out of the rule, as qualified in the case just alluded to. The admission of such testimony arises from necessity, and the certainty that it is true, from the want of motive to falsify. Both these are apparent here."

FORM OF DECLARATION. — The declaration may be oral. *Hosford v. Rowe*, 41 Minn. 245 (1889); *Humes v. O'Bryan*, 74 Ala. 64 (1883).

In Massachusetts a distinction obtains between declarations against pecuniary and those against proprietary interest. As to pecuniary interest, the unusual rule prevails that the declaration must be in the form of writing. Thus, where a suit was brought to recover back the amount of a tax collected by the defendant, a collector of taxes, from the plaintiff, who claimed to have paid the same to the defendant's predecessor in office, evidence was rejected of oral statements by the deceased collector that he had received the amount of the plaintiff's tax. "It was argued," the court say, "that this was within another exception to the rule respecting hearsay, viz. that the admission was made by the collector, in a matter against his interest at the time, inasmuch as it rendered him liable to the town as for so much money collected. . . . But as we think this has been confined wholly to the case of entries made in books, or other receipts, documents, or written memoranda, made by a person deceased, in relation to a matter contrary to his interest at the time, and which went to charge him with some debt or duty. . . . It was founded mainly on the consideration of the clearness and certainty of such written memoranda, made by a party, against his interest, in contradistinction to the looseness and uncertainty of verbal statements, or even of letters." *Lawrence v. Kimball*, 1 Metc. 524 (1840), relying on *Framingham Mfg. Co. v. Barnard*, 2 Pick. 532 (1824); *Jones v. Howard*, 3 All. 223 (1861).

The same strictness is not applied to declarations in derogation of proprietary interest. Such declarations may be oral. Thus, on an issue involving the nature of A.'s possession, the statement of B., while occupying the land, that he was merely holding as a tenant of A., is competent. "We are of opinion, that this question was admissible as *res gestæ*. It is true that this was a declaration only, and consisted in words; but they were words qualifying his act of possession and in disparagement of his own title, so far as that circumstance is of importance." *Marcy v. Stone*, 8 Cush. 4 (1851).

NOT ADMISSIONS. — To speak of declarations against interest as "admissions" seems unnecessarily confusing. The statement of a relevant fact by a party is itself a fact, which, under the name of an "admission," the rules of procedure, the "rules of the game," so to speak, constitute a waiver of proof. Certain rules of positive law, relating to privity, agency, &c., enable the statements of persons standing in certain definite relations to a party to be received, under proper circumstances, as being equally binding upon him as if made by himself.

An admission is not necessarily against the interest of the party. Its force in evidence, like that of a presumption of law, is not

based on logic, but upon procedure. It is not a *probatio*; it is a *levamen probationis*; — not proof, but a waiver of it.

The declaration against interest is made by a person, not a party, or enabled by privity or agency to speak for the party. It is not, therefore, an admission in any proper sense. Its probative force is due to the observed fact that men do not, as a rule, state what is against their interest — unless it is true. Very possibly this is an “admission” in the popular, colloquial use of the word; — but not in any sense that is of value to the law of evidence.

The rule now under discussion goes beyond privity or agency; it makes the declaration evidence between third parties. As was said in *Currier v. Gale*, 14 Gray (Mass.) 504 (1860), speaking of the declarations of one in possession of land that he held merely as tenant of another, “The defendant insists that it was competent, under the general rule of admitting the declarations of a party in possession, adverse to his own interest. Such declarations have in various forms and under different circumstances been deemed admissible. The principle upon which they are held admissible is not very clearly settled. When the declaration has been accompanied with an act pointing out some monument or existing mark of boundary, it has been allowed. So also as evidence against the party making the declaration, and all persons in privity with him, or claiming under him, it is competent. But the adjudicated cases go somewhat further, and hold that his declaration in disparagement of his apparent title, as indicated by his possession, may be used as evidence that his occupation was an occupation under another person, and thus make his possession to avail in favor of the person stated by him to be his landlord.”

A limitation upon the rule that only as to facts of long standing are such declarations competent, has been attempted. *Gilchrist v. Martin*, 1 Rich. (S. C.) Eq. 492 (1831).

The rule has been held, in the same state, to apply to criminal acts. *Coleman v. Frazier*, 4 Rich. (S. C.) 146 (1850). “I think it is true that a declaration, made by the party who does the act, as in this case stealing the letter containing the money, is admissible. It is very true that the rule that, where an entry or declaration, made by a deceased person, is against the interest of the party making it, it is admissible as evidence, was qualified by *Gilchrist & King v. Martin & West* (Bail. Eq. 492), and was restricted to cases where there was no interest to falsify the fact that it was made against the interest of the person making it, and that the entry or declaration was so ancient as to preclude suspicion that it was manufactured for the occasion. Under it alone, therefore, this declaration would not be admissible. But when it is remembered that this is

not of a matter of business, like those spoken of in that case, but was a criminal act, of which none could be so cognizant as the party, I think a reason will be found for its admission, arising out of the rule, as qualified in the case just alluded to. The admission of such testimony arises from necessity, and the certainty that it is true, from the want of motive to falsify. Both these are apparent here." *Coleman v. Frazier*, 4 Rich. 146 (1850). Apparently no such modifications have been generally adopted.

CHAPTER VII.

DECLARATIONS IN THE COURSE OF OFFICE OR BUSINESS.

§ 697. The class of cases which forms the FIFTH EXCEPTION to the general rule, that hearsay evidence must be rejected,¹ consists of declarations *in discharge of duty in the ordinary course of business or professional employment*. The rule is very commonly, but inaccurately, stated to be that all entries “made in the ordinary course of business” are admissible. But this is not so, and entries gratuitously made by a man, even in the ordinary course of business, merely for his own satisfaction, and not in the discharge of any *duty*, will not be admissible in evidence after his death.² The considerations which have induced the courts to recognise this exception appear to be principally these:—that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of duty are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of duty are usually subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.³

¹ It will be recollected that there are six such exceptions. See ante, § 607.

³ *Poole v. Dicus*, 1835 (Tindal, C.J.); 1 Ph. Ev. 319; 1 St. Ev. 348, 349.

² See *Hope v. Hope*, 1893, C. A.

§ 698.¹ One of the earliest cases,² illustrative of this subject, was an action for beer sold and delivered. The plaintiff was a brewer, and to prove the delivery it was shown that, in the usual course of plaintiff's business, it was the duty of his draymen to come every night to the clerk of the brewhouse, and give him an account of the beer delivered during the day, which he entered in a book kept for that purpose, to which the draymen set their hands. An entry in this book, stating the delivery of the beer in question, and signed by a drayman, whose signature and death were proved, was put in, and was held to be sufficient evidence to maintain the action. This decision has since been followed in many cases. For example, the service of a notice to quit has been held, after his death, to be sufficiently proved by the indorsement of service upon a copy of the notice, made by the attorney who served it; it being shown to be the ordinary course of business in his office to preserve copies of such notices, and to indorse the service thereon.³

§ 699. Similarly, it has been held that a payment of rates is sufficiently shown by an entry of the receipt of rates made in his book by a deceased clerk of a collector, who had been duly appointed; ⁴ that the dishonour of a bill of exchange by the acceptor, and notice thereof to the indorser, is proved by entries in the books of the messenger of a bank, and of the clerk of a notary, shown to have been made in the usual routine of business; ⁵ and, upon like proof, proof of a letter having been sent, and (after notice to the other side to produce it) of its contents, is afforded by the letter-book of the plaintiff, a merchant, in which a deceased clerk had inserted what purported to be the copy of a letter to the defendant, and had further made a memorandum stating that he had sent such letter.⁶

¹ Gr. Ev. § 116, in part.

² *Price v. Torrington*, 1703 (Ld. Holt); 1 Sm. L. C. 277. See, also, *Pitman v. Maddox*, 1698; *Rowcroft v. Basset*, 1802 (Le Blanc, J.).

³ *Doe v. Turford*, 1832; *R. v. Cope*, 1835 (Ld. Denman); *R. v. Dukinfield*, 1848; *Stapylton v. Clough*, 1853.

⁴ *R. v. St. Mary, Warwick*, 1853.

⁵ *Sutton v. Gregory*, 1797 (Ld. Kenyon); *Poole v. Dicas*, 1835;

Nichols v. Webb, 1823 (Am.); *Welch v. Barrett*, 1819 (Am.); *Halliday v. Martinett*, 1822 (Am.); *Butler v. Wright*, 1829 (Am.); *Hart v. Williams*, 1829 (Am.); *Nicholls v. Goldsmith*, 1831 (Am.).

⁶ *Pritt v. Fairclough*, 1812; *Hagedorn v. Reid*, 1813. See, also, *Champneys v. Peck*, 1816; *Doe v. Langfield*, 1847; *East Union Ry. Co. v. Symonds*, 1850. But see *Rowlands v. De Vecchi*, 1882 (Day, J.).

On the same principle, where a police-constable had, in the course of his *duty*, made a verbal report to his inspector, stating where he was going and what he was about to do, proof of such report was held to be admissible evidence for the Crown on the trial of an indictment charging the prisoner with the murder of the policeman.¹

§ 700. Of late years, great *disinclination* has been evinced by the courts to extending the principle of allowing entries which have been made in pursuance of duty in the ordinary course of business to be admitted as evidence further than the decisions have already carried it.² Accordingly, it has (as already mentioned) been held that, to be admissible, an entry by a deceased person must have been made in pursuance of some *duty*.³ It has further been held necessary that the person who made such entry should not only have done so in the course of some *duty*, but should also have had personal knowledge of the statements contained therein.⁴ In accordance with this latter principle, in an action⁵ for the price of coals sold at the pit's mouth, an entry, made in the following manner, was rejected. In ordinary course, it was the duty of one of the workmen at the pit to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ one Baldwin to make entries in the books from his dictation, and Baldwin read them over every evening to the foreman. The foreman and the workman, whose duty it was to give notice to him, being both dead at the time of the trial, Baldwin was called to produce the book, to prove thereby the delivery of the coal in question. Such book was, however, held inadmissible, since the entries, although having been made under the foreman's direction they might be regarded as made by him, as such foreman had no *personal knowledge* of the facts stated in them, but derived his informa-

¹ *R. v. Buckley*, 1873 (Lush and Mellor, JJ.).

² See *Doe v. Skinner*, 1848; *Smith v. Blakey*, 1867; *The Henry Coxon*, 1878; *Massey v. Allen*, 1879.

³ *Hope v. Hope*, 1893, C. A., where it is pointed out that the case of *Rawlins v. Rickards*, 1860 (in which it was held that an entry by a deceased solicitor in his diary, noting the fact of his having attended a

client on a certain day on her executing a deed of appointment was admissible in evidence), is of very doubtful authority, since it is extremely hard to see in that case what *duty* the solicitor was under to make the entry; see also *Bright v. Legerton*, 1860-1, and *Kerin v. Davoren*, 1861 (Ir.).

⁴ *Ryan v. Ryan*, 1889 (Ir.).

⁵ *Brain v. Preece*, 1843.

tion at second-hand from the workman, did not possess the same guarantee for the truth of the entries as existed in the cases establishing the principle of receiving entries by a deceased person in the usual course of business,—in all of which cases the party making the entry had himself done the business, a memorandum of which he had inserted in his book.

§ 701. Where, to show that a Jew was of age, it was proved that Jewish children are usually circumcised on the eighth day from their birth, and that it belongs to the office of the chief Rabbi to perform this rite, and to make an entry thereof in a book kept at the synagogue, and upon proof that the Rabbi was dead, this book was tendered in evidence, it was rejected, probably on the ground (none is stated in the report) that there was no legal *duty* to make the entry;¹ while in another case,² an entry made by a deceased employer in a book in which he had in the course of his business been in the habit when hiring farm servants of always entering the time and terms of such hiring, was rejected. The decision in this last case was *expressly* (while, as we have seen, that in the case of the Rabbi was *probably*) on the ground that, although it might be the practice, it was not the *duty*, of the person who, in fact, generally did so, to make such entries.

§ 702. The Legislature itself has, in at least one instance, recognised and acted upon the exception under discussion.^{2a} For the statute, which regulates the Civil Bill Courts in Ireland,³ enacts that “a book or books shall be kept by every officer appointed for the service of process, in such form as shall be directed or approved by the chairman or assistant barrister; in which shall be entered the names of the plaintiff and defendant by or against whom any process shall be issued, the cause of action, the day on which such process shall be received to be served, the day on which such process shall be served or executed, the place where, and the name or description of the person on or with whom, such process shall be served or left, and in case any such process shall not have been duly served or left, then the cause of such

¹ Davis v. Lloyd, 1844.

² R. v. Worth, 1843.

^{2a} I.e., the exception to the general rule against admitting hearsay, which allows entries made by a deceased

person in the course of his duty or business, to be received as evidence.

³ 14 & 15 V. c. 57 (“The Civil Bill Courts (Ireland) Act, 1851”), § 19.

C. VII.] ENTRIES AND ACTS MUST BE CONTEMPORANEOUS.

service not having been effected shall be stated; and each and every process-officer shall attend, and produce such book or books to the chairman or assistant barrister, at each and every sessions of the peace, or shall cause such book or books to be produced to such chairman or barrister in case of the *unavoidable absence* of such process-officer; and in case of the *death, illness*, or such *absence* as aforesaid of any such process-officer, the book or books of such process-officer, kept by him as aforesaid, verified on oath as to his handwriting by some credible person, shall be produced at the sessions, and shall there be *primâ facie* evidence of the truth of the several matters entered therein as aforesaid."

§ 703. The rules which regulate the reception of entries as made by a deceased person in the regular course of business, are, in many respects, the same as those which prevail with respect to declarations against interest. For instance, the death,¹ the handwriting, and the official character,² of the person who made the entry must be proved; and it should further appear that he had no motive to misstate. In some other particulars, however, a marked distinction exists between the two classes of cases.

§ 704. In the first place, to render entries made in the course of office or business admissible, they must,—unlike declarations against interest,—be proved to have been made *contemporaneously with the acts which they relate*.³ "It is to be observed," said a learned judge, "that in the case of an entry against interest, proof of the handwriting of the party, and of his death, is enough to authorise its reception; at whatever time it was made it is admissible: but in the other case [of an entry made in the course of business], it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry."⁴ The word "contemporaneous," does not mean that the entry must have been made at the immediate time of the occurrence; but it will be sufficient if made within so short a time after as reasonably to be considered part of the transaction. Thus, if the business be

¹ See *Cooper v. Marsden*, 1793 (Ld. Kenyon). See ante, § 669.

² *Doe v. Wittcomb*, 1851.

³ *Ryan v. Ryan*, 1889 (Ir.); *Doe v. Bevis*, 1848; *Doe v. Skinner*,

1848 (Parke, B.).

⁴ Parke, B., in *Doe v. Turford*, 1832; approved by Park, J., in *Poole v. Dicus*, 1835.

done in the morning, and the entry be made in the evening of the same day,¹ or perhaps even on the following morning,² it will be sufficient. Where, however, several intermediate days had elapsed between the date of the transaction and the time of inserting an entry of it in the book, the evidence has been rejected;³ and in one American case, the interval of a single day was held to constitute a valid objection.⁴ The fact that the entry was made contemporaneously may, like any other fact, be established either by direct testimony, or by proof of any circumstances sufficient to raise a reasonable inference that such was the case.⁵

§ 705. Secondly, while declarations against interest are often admissible to prove *independent matters*, which, though forming part of the entry, are not in themselves against the interest of the declarant,⁶ a stricter rule prevails with respect to official or business entries. For, "whatever effect may be due to an entry made in the course of office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances."⁷ Accordingly, a certificate of a deceased sheriff's officer, which had been returned by him to the office in the ordinary routine of his duty, and which specified, among other circumstances connected with the arrest, the *place* where it happened, was held not to be evidence to show the particular spot where the caption took place, that circumstance being a mere incident of the performance of the officer's duty.⁸ "This decision turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact."⁹

§ 706. Some persons, indeed, have contended that the admissi-

¹ Price v. Torrington, 1703; Ray v. Jones, 1836; Curren v. Crawford, 1818.

² Ingraham v. Bockins, 1823 (Am.).

³ Forsythe v. Norcross, 1836 (Am.).

⁴ Walter v. Bollman, 1839 (Am.).
Contrà, in England, The Henry Coxon, 1878.

⁵ East Union Ry. Co. v. Symonds, 1850.

⁶ Ante, §§ 667—679.

⁷ Chambers v. Bernasconi, 1834
See, also, Percival v. Nanson, 185 (Pollock, C.B.); and Polini v. Gray and Sturla v. Freccia, 1879, C. A. 1881, H. L.

⁸ Chambers v. Bernasconi, 1834.

⁹ Poole v. Dicas, 1835 (Park, J.).
See, also, id. (Tindal, C.J.).

C. VII.] ADMISSIBLE, THOUGH BETTER EVIDENCE EXISTS.

bility of entries made in the course of business is also subject to a third rule, which certainly does not apply to declarations against interest. Such supposed qualification has been alleged to be to this effect;—namely, that entries made in the course of office or business cannot be admitted, unless *corroborated by other circumstances which render it probable that the facts therein recorded really occurred*. The supposition that any such qualification exists apparently rests, partly, on a supposed dictum of Taunton, J.;¹ partly, on a misapprehension of the rule, adopted by Lord Wensleydale, that an entry made in the course of business is admissible “where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place;”² and partly on the circumstance, that, in one or two of the later cases on the subject, confirmatory evidence has in fact been adduced, and its existence has been noticed by the court as tending to establish the correctness of the entry.³ However, the existence of any such qualification is denied by Mr. Phillpotts, who contends that, though corroborative evidence must naturally add to the *value* of entries, it cannot be deemed essential to their *admissibility*,⁴ and this view is, it is submitted, the correct one.

§ 707. However this may be, the further contention that entries in the course of business will only be received when the nature of the case is such as to render better evidence unattainable, has, at all events, been expressly rejected, since “it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expense and inconvenience would be enormous. The rejection of the evidence which

¹ Doe v. Turford, 1832, making his lordship say, “A minute in writing like the present, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances which render it probable that * that fact occurred, is admissible in evidence. Those corroborating circumstances must be proved:

and here many such circumstances did appear.” Mr. Phillpotts suggests that the words, “the entry was made when,” have probably been omitted by accident at the place marked with the star: 1 Ph. Ev. 324.

² Doe v. Turford, 1832.

³ Id.; Poole v. Dicus, 1835.

⁴ 1 Ph. Ev. 324. See R. v. Cope, 1835 (Ld. Denman).

has been received, would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange.”¹

§ 708. To render an entry in the course of business, then, receivable in evidence, it must have been made contemporaneously with the matter to which it relates, and in the usual routine of business, by a person whose duty it was to make the whole of it,² who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead;³ and, provided all the terms of this proposition be satisfied, it seems to be immaterial, excepting so far as regards the *weight* of the evidence, that more satisfactory proof might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere oral statement, which has never been reduced to writing.⁴

§§ 709—10.⁵ In the United States the doctrine that entries fulfilling the above requirements are admissible in evidence has been extended to *entries made by the party himself* in his own shop-books;⁶ at least, where they were evidently contemporaneous with the facts to which they refer, and formed part of the *res gestæ*. Being the acts of the party himself, they are received with the greater caution; but still they may be seen and weighed by the jury. This doctrine is not in accordance with the principles of the English common law, as now understood,⁷ but in the time of James I. it seems to have been regarded as sound. For in 1609 an Act was passed⁸ “to avoid the double payment of debts,” which clearly recognised a tradesman’s shop-books as instruments of evidence on his behalf, since it provided that entries in them should

¹ *Poole v. Dicas*, 1835 (Tindal, C.J.). The same rule prevails with respect to declarations against interest: ante, § 681.

² *Stapylton v. Clough*, 1853; *Trotter v. Maclean*, 1879 (Fry, J.). See, however, *Miller v. Wheatley*, 1890 (diss. O’Brien, J.) (Ir.).

³ See *Doe v. Wittcomb*, 1853, H. L.; *Miller v. Wheatley*, supra.

⁴ Ante, § 672.

⁵ Gr. Ev. § 118, in part.

⁶ For the American statutes and

decisions on the above subject, see notes to § 641 of the first three editions of this work; also notes to Gr. Ev. § 118.

⁷ *Ellis v. Cowne*, 1849 (Wilde, C.J.). In *Smyth v. Anderson*, 1849, the plaintiff’s books were tendered in evidence by him to show that he had, throughout a sale effected by means of an agent, debited the defendant as principal, but were rejected.

⁸ 7 J. 1, c. 12.

not be evidence after the lapse of more than twelve months. This Act is no doubt, in practice, always treated by our courts of law as a dead letter. Yet it, in truth, is still unrepealed, and was in fact recognised and made perpetual by the Statute Law Revision Act, 1863,¹ which repealed a few words in it which had originally made it only temporary. It is therefore necessary that the original Act should be inserted in this place.² The reason for this no doubt largely is that, while the statute is never noticed, tradesmen's books may, by the common law, be referred to to what is technically called "refresh the memory." They thus, in effect, and for practical purposes, become evidence, though not technically so called, and not being technically "evidence," the prohibition against those which are more than twelve months old does not attach to them.²

¹ 26 & 27 V. c. 125.

² The statute of James I. is expressed in the curious language then current, and it is as follows:—"Whereas divers men of trades, and handicraftsmen, keeping shop-books, do demand debts of their customers upon their shop-books long time after the same hath been due, and when, as they have supposed, the particulars and certainty of the wares delivered to be forgotten, then either they themselves, or their servants, have inserted into their said shop-books divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the said debt: (2.) And whereas divers of the said tradesmen and handicraftsmen, having received all the just debts due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suits of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof, by writing or witnesses, of the said payments, that may countervail the credit of the said shop-books, which few or none can do in any long time

after the said payments: (3.) Be it therefore enacted by the authority of this present Parliament, that no tradesman or handicraftsman keeping a shop-book as is aforesaid, his or their executors or administrators, shall be allowed, admitted, or received, to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done. II. Provided always, that this Act, or anything herein contained, shall not extend to any intercourse of traffick, merchandizing, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due, or work done or to be done, between merchants and merchants, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchan-

§ 711. Independently of all statutable sanction, our courts of equity have for years past, to a certain extent, acted upon the principle of admitting shop-books in evidence, in taking accounts in cases in which the vouchers have been lost.¹ And now, by R. S. C., 1883, the court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary accounts to be taken, and "may, either by the judgment or order directing the account to be taken, or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched; and in particular may direct that, in taking the account, the books of account in which the accounts in question have been kept shall be taken as *primâ facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."²

§ 712.³ In the administration of Roman law, the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, was deemed presumptive evidence (*semiplena probatio*)⁴ of the justice of his claim; and in such cases, the suppletory oath of the party (*juramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favour.⁵ Several modern systems of jurisprudence follow this

dize, but that for such things only they and every of them shall be in case as if this Act had never been made; anything herein contained to the contrary thereof notwithstanding."

¹ *Lodge v. Prichard*, 1853. See, post, § 812.

² Ord. XXXIII. rr. 2, 3. See *Lodge v. Prichard*, 1853; *Newberry v. Benson*, 1854; *Ewart v. Williams*, 1855; *Cookes v. Cookes*, 1863; *O'Grady v. Corr*, 1876 (Ir.); *Alford v. Clay*, 1875 (Ir.).

³ Gr. Ev. § 119, verbatim.

⁴ This degree of truth is thus defined by *Mascardus*:—"Non est ignorandum probationem semiplenam eam esse, per quam rei gestæ *fides aliqua* fit iudici: non tamen tanta ut jure debeat in pronuncianda sententia eam sequi": 1 de Prob., Quæst. 11, n. 1, 4.

⁵ "Juramentum (suppletivum) defertur ubicunque actor habet pro se—

aliquas conjecturas, per quas iudex inducatur ad suspicionem vel ad opinandum pro parte actoris": 3 Masc. de Prob., Concl. 230, n. 17. The civilians, however they may differ as to the degree of credit to be given to books of account, concur in opinion that they are entitled to consideration, at the discretion of the judge. They furnish at least the *conjecturæ* mentioned by *Mascardus*; and their admission in evidence, with the suppletory oath of the party, is thus defended by Paul Voet, De Statutis, § 5, cap. 2, n. 9:—"An ut credatur libris rationem, seu registris uti loquuntur, mercatorum et artificum, licet probationibus testium non juventur? Respondeo, quamvis exemplo perniciosum esse videatur, quemque sibi privata testatione, sive adnotatione facere debitorem. Quia tamen hæc est mercatorum cura et opera, ut debiti et crediti rationes diligenter conficiant. Etiam in eorum foro et

doctrine. Thus, by French law, the books of merchants and tradesmen, regularly kept, and written from day to day without any blank, when the tradesman has the reputation of probity, constitute a semi-proof, and, with his suppletory oath, are received as full proof to establish his demand.¹ The doctrine is also acted upon in Scotch law, by which the books of merchants and others, if kept with such a reasonable degree of regularity as to be satisfactory to the court, may be received in evidence, the party being allowed to give his own "oath in supplement" of such imperfect proof; though a course of dealing, or other "pregnant circumstances," must apparently be, in general, first shown by evidence aliundè, before the proof can be regarded as amounting to that degree of semi-plena probatio, which may be rendered complete by the oath of the party.²

§ 713. Reference to these laws is made here because it is conceived that the adoption of a somewhat similar practice in all the English and Irish courts of justice would prove highly beneficial; especially in cases where actions are brought or defended by the representatives of persons deceased.

causis, ex æquo et bono est judicandum. Insuper non admissio aliquo litium accelerandarum remedio, commerciorum ordo et usus evertitur. Neque enim omnes præsentì pecunia merces sibi comparant, neque cuiusque rei venditioni testes adhiberi, qui pretia mercium noverint, aut expedit, aut congruum est. Non iniquum videbitur illud statutum, quo domesticis talibus instrumentis additur fides, modo aliquibus adminiculis juventur." See, also, Hertius, de Coll. Leg. § 4, n. 68; 7 Stryk. de Sem. Prob., Disp. 1, cap. 4, § 5; Menoch. de Præs., lib. 2, Præs. 57, n. 20, and lib. 3,

Præs. 63, n. 12.

¹ Poth. Obl., Part iv. ch. 1, art. 2, § 4. By the Code Napoleon, merchants' books are required to be kept in a particular manner therein prescribed, and none others are admitted in evidence: Code de Commerce, Liv. 1, tit. 2, art. 8—12.

² Tait, Ev. (Sc.) 273—277. This degree of proof is there defined as "not merely a suspicion,—but such evidence as produces a reasonable belief, though not complete evidence." See, also, 2 Dickson, Ev. (Sc.), §§ 1179 et seq.; Glassf. Ev. (Sc.) 550; Bell, Dig. (Sc.) 378, 898.

AMERICAN NOTES.

Shop-Books. — Books of Account. — The proof of matters of account, frequently embracing numerous items but slightly appealing to the memory, offers a field where the regular rules of evidence can be applied only with much hardship and expense.

In mercantile communities, where many accounts are carried along on books of entry, where many clerks are employed, frequently changed and lost from knowledge or beyond the reach of process, a natural importance attaches to the book entry itself. It is felt that the fact of the entry is, to a certain extent, circumstantial evidence of its truth; that there is an inherent accuracy in an entry made, without motive to misrepresent, by a quasi-machine in the course of business, where it is both easier and better to enter the truth than anything less likely to adjust itself to other entries.

A persistent feeling of this kind could hardly fail to impress itself upon courts, and the rules to be here briefly considered show a very important tendency to relax, in a common-sense sort of way, the rules of evidence in favor of written entries in books of account.

SHOP-BOOKS. — The historical development of the rule admitting the entries on books of account began with the "shop-book," technically so called. The statute 7 Jac. 1 C. 12, 1 Eng. Rev. Stats. 691, refers to the use of the "shop-book" as already existing.

The early use of the "shop-book" was largely from necessity. Parties had not as yet been made competent witnesses, and yet, except where a clerk had been kept and could testify to the account, the evidence of the trader or mechanic was absolutely essential to proof of the claim. The usual rules of evidence had therefore to be relaxed to a certain extent in favour of trade; but to a certain extent only. A tradesman or handicraftsman who offered his "shop-book" in evidence, did not testify to the entry; he was not a witness to that extent. The book spoke for itself as to the entry. The tradesman merely swore to his book, that it was regularly kept as his original book of accounts, &c. The oath was not that of a witness. The relation of the witness to the book was more nearly analogous to the *semiplena probatio* and the *plena probatio* of the civil law.

Probably the oath was required to be administered in court. *Frye v. Barker*, 2 Pick. 65 (1823).

The admission of such evidence is, for the most part, rested upon this supposed necessity; — many merchants and shop-keepers are not able to keep a clerk, and would not, being themselves in-

competent as witnesses, be able to prove their accounts at all if such evidence were excluded. *Cole v. Dial*, 8 Tex. 347 (1852). "Books of original entries, verified by the truth of the party, and that the entries were made by him, have always been received in evidence in Pennsylvania, from necessity, as business is very often carried on by the principal, and many of our tradesmen do not keep clerks. . . . It must be in an account of the daily transactions of the party, and not in the nature of a receipt-book. It must be in a course of dealing between the parties, and the entries made about the time of the transaction. . . . The law fixes no precise instant when the entry should be made. At or near the time of the transaction, they should be made. It is not to be a register of past transactions, but a memorandum of transactions as they occur." *Curren v. Crawford*, 4 S. & R. 3 (1818).

The statement of the supreme judicial court of Massachusetts, in *Harwood v. Mulry*, 8 Gray, 250 (1857), that "the extent to which such evidence was admissible has not been marked with entire uniformity in the different states of the Union, but each has adopted its own system," seems entirely correct.

In Connecticut, it is said that the rule as to shop-books is "coeval with the government." *Terrill v. Beecher*, 9 Conn. 344 (1832).

The rule and its statutory enlargement were adopted by certain of the American colonists. The Massachusetts rule is thus stated in 3 Dane's Abr. Ch. 81, Art. 4, p. 318. "The rule in Massachusetts is, and ever has been, to admit in evidence books of accounts, kept in the daybook or ledger form; as to the sale and delivery of goods; as to the payments of sums of money not exceeding \$6.67; and as to labor performed; with these restrictions, that the original entries or first charges be produced to the court and jury. The creditor must swear, if the charge was made by himself, that he made it at, or very near, the time the thing was done; and that it is true, and, if required, that it has not been paid. If a clerk made the charge, he must swear to like facts; and if the person who made the charge be dead, his handwriting must be proved; and if a clerk, &c., that he was usually intrusted by the creditor to make such entries in his books, and that the books produced in evidence are or were the plaintiff's account-books. A book account annexed to the writ or filed in, is the thing to be proved, and by the party using this kind of evidence; and as this is evidence from the interested party himself, and repugnant to the general rules of evidence, though perhaps of necessity, it is to be admitted under every guard and security the nature of the case admits of; and therefore it is one of the best precautions to require the party, so proving his account, to file, in the case, all the items of it, as early as he must have his writ served, or his account, if

defendant, filed in, in order to give the opposite party reasonable time to prepare to meet them; and so has been our practice arising from ancient statutes revised and included in the act of Oct. 30, 1784, and of Feb. 27, 1794."

Under certain circumstances, the shop-book was admissible to show the delivery of goods or the performance of work for third persons.

Where A. directed B. to get C. to do, on A.'s account, what blacksmith work B. wished to have done, and agreed to pay C. for it; and B., when called as a witness in a suit by C. against A., was unable to recollect the dates or items of the account, it was held that C.'s shop-book, with his suppletory oath, was admissible in evidence to prove his charges against A. "The rule, that where there is a delivery of goods to third persons, the book cannot be admitted, is not without exceptions. In cases of small articles procured by the members of a family, and delivered to children or servants, from time to time, it would be impossible that such delivery could generally be proved. To enforce this rule, as inflexible, would therefore produce much more serious injury than the relaxation of it, under circumstances where the book itself contains the articles, as delivered, and which is subject to the examination of the debtor." *Ball v. Gates*, 12 Metc. 491 (1847).

In New Hampshire, the evidence is rejected where other evidence — *e. g.*, that of the servants to whom the articles were delivered — is available. Richardson, C. J. says: — "As this is in truth the admission of a party to be a witness on his own cause, the practice (of admitting account-books of the party supported by his oath) is confined to cases in which it may be presumed there is no better evidence, and has many limitations. . . . In the first place it must appear, that the charges are in the handwriting of the party, who is sworn;" because if they are not, the third party making them can be sworn, and there is no use of calling the party himself. So if the charges do not appear to be the fair record of daily transactions, free from suspicious circumstances of fraud, &c., the book is not admissible. If the account has been transferred to another book, it must be produced. If it appears by the book itself on the examination of the party that there is better evidence, the book cannot go to the jury. *Eastman v. Moulton*, 3 N. H. 156 (1825).

LIMITED TO SMALL AMOUNTS. — The shop-book was limited to petty trading. Probably the usual limitation to forty shillings (or its equivalent in the depreciated American currency of the different states) may be traced to the influence of another early English statute, 3 Jac. chap. 15 (1605), in the preamble to which it is recited that "whereas by virtue of divers acts of Common Council made within the City of London, the Lord Mayor and Aldermen

of the same City, for the Relief of poor Debtors dwelling within the said City, have accustomed monthly to assign 'Two Aldermen and Twelve discreet Commoners to be Commissioners, and sit in the Court of Requests, commonly called the Court of Conscience, in the Guildhall of the same city, there to hear and determine all Matters of debt not amounting to the Sum of forty Shillings, to be brought before them,' " therefore the procedure is amended.

The same limitation of forty shillings (see Plymouth Colony Laws, p. 128 (1660)) was preserved among the colonists.

As early as 1782, in *Cleaves' Case*, in Essex County, as cited in 3 Dane's Abr. Ch. 1 Art. 4 § 2, the supreme judicial court of Massachusetts "decided that in proving money payments by book-charge and the party's suppletory oath, no one item or charge in cash must exceed 40s. or \$6.67, that originally it was found necessary to limit this kind of evidence to some moderate sum; and it appeared from immemorial practice that this was the sum." In *Davis v. Sanford*, 9 All. 216 (1864), the same court say: — "The principal charges are for cash, and the items exceed forty shillings in amount. The book is inadmissible in proof of these charges." *Davis v. Sanford*, 9 All. 216 (1864); *Burns v. Fay*, 14 Pick. 8, 12 (1833).

"The account-books of a party are admissible, with his suppletory oath, to prove a charge of money to the amount of \$6.67." *Kelton v. Hill*, 58 Me. 114 (1870).

"The book of the deceased, if shown to be in his own handwriting, would not be evidence of the payment of such a sum as this, as was ruled by the court, nor indeed of any cash payment exceeding \$6.66." *Rich v. Eldredge*, 42 N. H. 153 (1860).

In Ohio, charges for money loaned, there being no mutual items of account, have been rejected. *Hough v. Henk*, 8 Oh. Circ. Ct. 354 (1894). See also, to same effect, *Burns v. Fay*, 14 Pick. 8 (1833); *Kelton v. Hill*, 58 Me. 114 (1870); *Bassett v. Spofford*, 11 N. H. 167 (1840).

But where such mutual items of account are included, the mere fact that certain of the items are for cash loaned in the usual course of business is not sufficient to exclude any part of the account. *Cargill v. Atwood*, (R. I.) 27 Atl. 214 (1893).

In North Carolina, under a statute, the shop-book was "good evidence for small articles . . . proved to be delivered within two years." *Alexander v. Smoot*, 13 Ired. (N. C.) Law, 461 (1852).

The later development of the rule of shop-books has admitted them as evidence of larger sums than forty shillings. *Wilson v. Wilson*, 6 N. J. Law 95 (1822).

For example, an account of \$1521.84 was allowed in *White v. Whitney*, 82 Cal. 163 (1889). So of one of \$98.45 in *Richardson v. Emery*, 23 N. H. 220 (1851).

NATURE OF CHARGE LIMITED. — The rule being established in favor of small tradesmen for petty amounts of goods sold, work done, &c., the innovation was limited to the precise case covered by the rule. Other items than those usually embraced in such an account cannot be proved by the shop-book and suppletory oath of the tradesman.

"A book charge for three months' service as one item, was inadmissible, according to all the authorities." *Henshaw v. Davis*, 5 Cush. 145 (1849); *Karr v. Stivers*, 34 Ia. 123 (1871).

An item of "7 gold watches, \$308," is not a proper subject of book charge. "This species of evidence was not the proper evidence to establish a sale of this magnitude and character." *Bustin v. Rogers*, 11 Cush. 346 (1853).

Items for cash have been rejected. *Vosburgh v. Thayer*, 12 Johns. 461 (1815); *Davis v. Sanford*, 9 All. 216 (1864); *Carman v. Dunham*, 6 Halstead (N. J.) 189 (1830); *Cole v. Dial*, 8 Tex. 347 (1852); *Wilson v. Wilson*, 6 N. J. Law, 95 (1822). "The necessity of the case, however, which gave birth to our practice in this particular, by no means warrants that entries in day books should be considered as evidence of money lent or cash paid. In those instances the necessity does not exist; for the party has it in his power to take notes or receipts, in the ordinary course of dealing." *Ducoign v. Shreppel*, 1 Yeate's, 347 (1794).

So, under a statute in Connecticut, modifying the early law of shop-books, it is said that the rule "has not been extended so as to embrace property loaned, and not returned; nor to compensation for injuries of any kind; nor to recover money paid on a note, which had not been applied. . . . For similar reasons, it ought not to be extended to money or other articles, delivered in fulfillment of any contract." *Terrill v. Beecher*, 9 Conn. 344 (1832).

The consideration of a promissory note cannot be proved in this way. "It would be extending a rule of evidence peculiar to some of the New England states, greatly beyond any of the precedents." *Rindge v. Breck*, 10 Cush. 43 (1852).

The evidence is not admissible to prove a charge of \$19.06 for labor on a petition to enforce a mechanics' lien. "To admit them in this proceeding would be a step beyond any case yet decided. . . . The party has it in his power to secure other evidence of the work which he has performed, either by the testimony of the contractor, or of his own fellow workmen." *Lynch v. Cronan*, 6 Gray, 531 (1856).

The books of a keeper of a billiard-table are not competent under this rule. *Boyd v. Ladson*, 4 M'Cord, 76 (1826); or for "billiards and drinks" and "games." *Baldrige v. Penland*, 68 Tex. 441 (1887).

But the accounts of an attorney may be proved in this way.

Codman v. Caldwell, 31 Me. 560 (1850). An attorney at law can prove the rendering of services by his day-book and apparently also by a private trial docket. *Briggs v. Georgia*, 15 Vt. 61 (1843). This has, however, been quæried in Pennsylvania, and, so far as relates to a charge for commissions on collection it has been held in that state that "cash is not a proper subject for book charge, neither is interest or commission as cash." *Hale v. Ard*, 48 Pa. St. 22 (1864). In Connecticut, a party was not allowed to show the payment of the hundred dollars on a note in this way. The court say: — "It would be difficult, perhaps, to lay down any general principle, which would determine, in all cases, what articles may and what may not be charged on book. But, no charge can be admitted on book, unless the right to charge exists at the time of delivering the article, and arises in consequence of such delivery." *Bradley v. Goodyear*, 1 Day, 104 (1803). In North Carolina, by statute, the amount of charge is limited to sixty dollars. *Bland v. Warren*, 65 N. C. 372 (1871).

The entry is not admissible to show the time during which a vessel was at a wharf. "This suit is neither for goods sold, nor for work done, and it has been always understood, that entries made by the plaintiff himself, are evidence in no other cases. It is dangerous to allow a party to make evidence in his own favour. The rule must be confined, to the two cases that have been mentioned; we see no distinction between the plaintiff's giving his book of original entries in evidence, to prove the use and occupation of a wharf, and giving it in evidence, to prove the use and occupation of a house, or of anything else." *Wilmer v. Israel*, 1 Browne, 257 (1811).

CONFIRMATION ALIUNDE. — Where such proof is possible, the plaintiff is at liberty, even if not required to do so, to confirm his book by evidence of its correctness, from sources other than his own suppletory oath.

For example, by the evidence of other customers, "that they had dealt and settled with the plaintiffs, and that they kept fair and honest books." *Linnell v. Sutherland*, 11 Wend. 568 (1834).

The delivery of certain of the items charged may also be proved, in confirmation of the account. *Linnell v. Sutherland*, 11 Wend. 568 (1834). In *Vosburgh v. Thayer*, 12 Johns. 461 (1815), it is said to be necessary to show the course of dealing, that the party has no clerk; that some of the articles have been delivered; that the books and the account-books of the party are fairly and honestly kept, and this by those who have dealt and settled with him. Another reason given is that the party debited is shown to have reposed confidence by dealings with and being entrusted by the other party. *Vosburgh v. Thayer*, 12 Johns. 461 (1815).

"Reputation in the neighbourhood of keeping correct accounts"

has been considered a sufficient confirmation. *Landis v. Turner*, 14 Cal. 573 (1860).

The defendant may ascertain, "by cross-examination, the circumstances under which the entries are made." *Thomson v. Porter*, 3 Strob. Eq. 58 (1850).

The court may admit the book *de bene*, conditional upon corroboration being furnished, and if corroboration is not furnished, reject it. "The judge could not know, until the end of the trial, what corroborating evidence there would be; and after the evidence was all in, it was proper for the court to decide upon the competency of the book. This is a species of evidence peculiar in its nature, of the competency of which, in each case, the court must decide." *Henshaw v. Davis*, 5 Cush. 145 (1849).

PRELIMINARY PROOF TO THE COURT. — As in other cases where the admissibility of evidence depends on proof of some preliminary fact, it is for the court to decide upon inspection whether the shop books offered in evidence are fairly kept, in good faith, as a contemporaneous record of daily transactions.

For example, in *Davis v. Sanford*, 9 All. 216 (1864), the court say: — "A few of the entries for goods sold contain the dates of the sales, and appear to be original charges made at or near the time of the transactions to be proved. But most of the entries are without any date; and on some of the pages the handwriting and ink are so much alike as to indicate that the entries were all made at one time, though they relate to separate sales which were probably made on different days. The book does not, on inspection, sufficiently appear to be the daily minutes of the party, made at or near the time of the transactions to be proved, so as to be admissible in evidence within the rule stated in *Cogswell v. Dolliver*, 2 Mass. 221, and *Prince v. Smith*, 4 Mass. 455.

In *Wilson v. Wilson*, 6 N. J. Law, 95 (1822) the court refuse to permit evidence of cash charges written on one of the last leaves of a book, detached from the daily entries and accounts by sundry intervening blank leaves and dated during the time of such entries and accounts. The decision, however, can hardly be regarded as of great authority, because of the three judges composing the court, one thought the entries should be rejected on that ground; another that all entries of cash were inadmissible; and the third judge was in favor of admitting the entries.

STATUTORY MODIFICATION. — The rule respecting shop-books had received, for reasons in part stated *supra*, an extended statutory development in various of the United States, even prior to the general removal of the restrictions disqualifying parties as witnesses. The general effect of these provisions was to authorize the reception in evidence in behalf of a party of all account-book entries which the court felt were made as a daily *bonâ fide* record

of contemporaneous transactions. *Robinson v. Dibble*, 17 Fla. 457 (1880); *Marsh v. Case*, 30 Wis. 531 (1872); *Patrick v. Jack*, 82 Ill. 81 (1876); *Thomson v. Porter*, 4 Strob. (S. C.) Eq. 58 (1850); *Woodbury v. Woodbury*, 50 Vt. 152 (1876); *Bay v. Cook*, 22 N. J. L. 343, 353 (1850); *Ganahl v. Shore*, 24 Ga. 17 (1858); *Williams v. Gunter*, 28 Ala. 681 (1856); *Neville v. Northcutt*, 7 Cold. 294 (1869); *Morse v. Congdon*, 3 Mich. 549 (1855); *Anderson v. Ames*, 6 Ia. 486 (1858).

The distinctive reason for admitting shop-books fell with the enactment of statutes permitting parties themselves to testify as witnesses. As the supreme court of Pennsylvania say:—"Questions in relation to books of entry as evidence, since the Act of 1869, making the parties witnesses, stand upon a different footing from that on which they stood before. Then, the book itself was the evidence, and the oath of the party was merely supplementary. Now, the party himself is a competent witness, and may prove his own claim as a stranger would have done before the Act of 1869. That the facts contained in the book, either of charge or discharge, of cash or goods, or whatever else is in his personal knowledge, might be proved by a stranger, no one doubts. A clerk, for instance, could prove the account, including cash items, from his own knowledge, and might use the book to refresh his memory. The party now stands by force of the act on the same plane of competency as the stranger stood upon, and therefore may make the same proof that a stranger could; he may also refer to entries made at the time of the transaction in corroboration of his testimony."

Nichols v. Haynes, 78 Pa. St. 174 (1875). The person making a memorandum may use it to refresh his memory. *Price v. Garland*, 3 N. M. 505 (1885).

An interesting illustration of the development of the law in this branch may be found in *Wilson v. Wilson*, 6 N. J. Law 95 (1822), where the court are willing to admit entries regardless of amount, but, in the case of at least one judge, consider that cash payments cannot be so proved. "According to the principles of the common law, a man's book of account cannot be produced in evidence in his favour; but a contrary practice has prevailed for such a great length of time throughout all the courts of judicature in this state, as to have formed a general rule quite the other way, that every man's book of account is evidence in his favour, provided the entries therein made are original entries, and were made at the time the transactions took place, or as nearly at the time as is usual. But this general rule never obtained in such latitude as to make everything lawful evidence that a man chooses to write in his book, for then he might enter in it the testimony of an absent witness, the confession of an adversary, or the service of a notice. The general rule extends to no other entries than for goods and articles

sold; work, labour, and services performed by a man, his servants, and means, and materials found and provided. Beyond these limits, which take in all trades and professions, entries in a man's book never were, and never ought to be evidence in his favour."

BOOKS OF ACCOUNT. — While this rule respecting the use of shop-books was in operation, another rule, — *i. e.*, that respecting entries made in course of business was shaping itself; — to the effect that, under practically the same conditions of contemporaneousness, *bonâ fide* keeping in course of business, absence of motive to misrepresent, &c., any entry which a person was under a legal or professional duty to make, or which was made, in the course of business was admissible, after the death of the declarant, in actions between third parties.

When almost universal legislation made parties competent witnesses in most instances, and thereby removed, as above stated, the original reason for the rule regarding "shop-books," the convenience of the use of this species of evidence was by no means lessened. *Stroud v. Tilton*, 4 Abb. Ct. of App. Dec. 324 (1866). On the contrary, the growth of commercial transactions rather tended to increase its value. The party, now a witness, became entitled to use his original books of account, when made by himself, in the usual course of business, and at about the time of the transaction, as a memorandum to refresh his recollection, regardless of the amount or nature of the transactions. If his recollection were not refreshed, but he were enabled to state that the entry was accurate when made, the entry itself became evidence, in connection with his statement.

A note to *Price v. Torrington*, 1 Smith's L. C. (9 Ed.) p. 566, is cited with approval in *Culver v. Marks*, 122 Ind. 554, 564 (1889) as follows: — " ' A party's own books of account and original entries are now, in most, if not all, of the United States, received as evidence of a sale and delivery of goods to, or of work done for, the adverse party.' On the same subject it is further said: ' The reason for its introduction has never been placed, by any court, on higher ground than that of necessity. For, in view of the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible or leave the creditor remediless.' "

It is, of course, necessary, that the account be relevant to the issue. *Jones v. Henshall*, 3 Col. App. 448 (1893).

And book entries may be competent for other reasons, — *i. e.*, as admissions. *German Nat. Bank. v. Leonard*, 40 Neb. 676 (1894); *First Nat. Bank v. Huber*, 75 Hun, 80 (1894); *Loomis v. Stuart*,

(Tex.) 24 S. W. 1078 (1893). Or as part of the *res gestæ* in a scheme of fraud; *Fleming v. Yost*, 137 Ind. 95 (1893). Or as circumstantial evidence, *e. g.*, where the effort is made to show that no interest had been paid by A. in a certain obligation by evidence that A.'s account-book showed many other payments of interest. *Peck v. Pierce*, 63 Conn. 310 (1893). That all A.'s payments of interest are not entered on this same book is a matter merely of the weight of the evidence. *Ibid.* But the book of deceased attorneys is not admissible of itself to prove that they did not receive a payment of money upon a judgment, in the absence of proof that this is the attorneys' only account book. *Shaffer v. McCrackin*, 90 Ia. 578 (1894).

The rapid extension of the rules respecting entries in course of business and memoranda to refresh recollection, when combined with the difficulty, expense and frequent impossibility of making other proof of book-accounts, could hardly fail, after parties became competent as witnesses, to affect the rule respecting "shop-books," which had so many important elements in common with the other rules. Legislative enactments and judicial legislation combined to make the extension a rapid one.

The old term "shop-book" is frequently retained, but the rule, as it obtains in the most of the different jurisdictions of the United States, has dropped every limitation of amount and allows, under the old conditions prescribed for the use of the shop-book, original entries on books of account, of merchants, tradesmen and others, made in the usual course of business, as a contemporaneous record of current transactions, by a party, or those in his employ, to be given in evidence whether in favor of or against the party who offers them. Probably the rule in Missouri is a fair example of the growth of this development. "Since a party may testify in his own favor, it must be conceded that he, as well as his clerk or book-keeper may refresh his memory from entries made by him, or under his eye and then testify as to the fact with his memory thus refreshed. Now in case of an account composed of many items, all this means nothing more than reading the book in evidence. This we all know from daily experience in the trial Courts. It is out of all reason to say that a merchant or his clerks can recall each item of the account, and a fair-minded witness will generally decline the attempt. Account-books are admitted in evidence from the person by whom they are kept when the entries are made at the time, or nearly so of doing the principal fact, because entries made under such circumstances constitute a part of the *res gestæ*. An entry thus made is more than a mere declaration of the party; it is a verbal act following the principal fact in the orderly course of business. Such is certainly the custom and course of business at the present day." *Hissrick v. McPherson*,

20 Mo. 310 (1855); *Railway Co. v. Murphy*, 60 Ark. 333 (1895); *Irish v. Horn*, 84 Hun, 121 (1895). In Maryland, entries in course of business are not admissible in favor of the person making them, though admissible to refresh his recollection. *Stallings v. Gottschalk*, 77 Md. 429 (1893).

"Tradesmen's books of original entries, made in the ordinary course of their business, are admitted in evidence under certain restrictions, on account of the impracticability of making better proof of the sales and delivery of articles in the course of a business conducted from day to day between parties; in reference to which it is not usual to make or evidence contracts in the methods in which isolated transactions are ordinarily transacted or evidenced. Certain facts must be shown, however, before such books are admissible. 1. It must be shown that the books offered contain the daily record of the business of the person for whom they are kept, as it transpires from day to day between himself and customers, and that the entries therein are original entries, made contemporaneously with the transaction of the business which the entries are intended to evidence. 2. The entries must relate to the business carried on by the person for whom the books are kept, and not to matters in no way connected with that business. 3. The entries must be sufficient to show with reasonable certainty what thing is made the basis of the charge. 4. The book must be on its face regular, and the entries free from suspicion of alteration. 5. The person offering such books, if they be kept by himself, must ordinarily, if living, make oath to their correctness; and we think further, that he should be held to make proof tending to show his probity and fair dealing; as that the accounts of other persons kept in the same manner are usually found correct, or so treated by customers." *Baldrige v. Penland*, 68 Texas, 441 (1887).

BOOKS OF ORIGINAL ENTRY. — As in case of the "shop-book," the account-book, to be admissible, must be the book of original entry. *Wall v. Dovey*, 60 Pa. St. 212 (1869); *Huston's Estate*, 167 Pa. St. 217 (1895); *Jones v. Henshall*, 3 Col. App. 448 (1893); *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602 (1892); *Durkheimer v. Heilner*, 24 Oreg. 270 (1893); *Skipworth v. Deyell*, 83 Hun, 307 (1894). For convenience, a properly verified transcript of the account has been admitted, the original entries being in court. *Texas, &c., Coal Co. v. Lawson*, 31 S. W. (Tex.) 843 (1895).

A "memorandum-book from which to enter up the charges against parties in what is called the sales book," cannot be received. *Hancock v. Hintrager*, 60 Ia. 374 (1882).

So "cash books and other books of occasional entry" cannot be admitted under the rule. *Kotwitz v. Wright*, 37 Tex. 82 (1872).

It is not in itself sufficient ground for rejecting the evidence that the book of original entries is kept in ledger form. *Hoover v.*

Gehr, 62 Pa. St. 136 (1869); *Swain v. Cheney*, 41 N. H. 232 (1860); *Wells v. Hatch*, 43 N. H. 246 (1861); *Faxon v. Hollis*, 13 Mass. 427 (1816).

But a single item constituting an account, and shown only on the ledger for a lump sum embracing many separate items, is not admissible. "It was not an entry upon a merchant's book, but was, on the contrary, an independent entry, by a party to the suit, of evidence in his own behalf." *Doty v. Smith*, 68 Hun, 199 (1893).

When it appears that charges have been posted into the ledger, the latter book, however, is a necessary part of the proof. *Bonnell v. Mawha*, 37 N. J. L. 198 (1874).

A check-book stub, from which the checks have been cut off, is not evidence for a plaintiff of the facts stated on it. "That is no book account. It is a check-book, a mere memorandum of a merchant, of the checks he draws on his banker. He cannot be sworn to such memorandum in his own case." *Wilson v. Goodin, Wright* (Ohio Supreme Ct.) 219 (1833).

So an invoice book of an agent is not evidence of the sale and delivery of goods. "The day-book containing the original transactions as they occurred, proved on oath or admitted, must be produced, or parol evidence given of the delivery of the merchandise." *Cooper v. Morrell*, 4 Yeates (Pa.) 341 (1807).

Where "the book produced was a small memorandum book, apparently carried in the pocket, consisting of ten leaves and containing sundry minutes, some in pencil and some in ink, of money paid out and money received," and an account therein contained was offered with the plaintiff's "own oath" to prove sale and delivery of forty-five cords of wood, this being the only charge of such a nature, the book was rejected. "There is no principle on which such extremely loose papers as those offered by the plaintiff are admissible in evidence, as a book of accounts. They do not possess that intrinsic evidence of their truth, without which the admission of account books is extremely dangerous to the cause of justice. In the first place, the charges in the hand-writing of the party, must appear in such a state that they may be presumed to have been his daily minutes of his transactions and business. . . . It would be much easier to manufacture a book containing the plaintiff's statement of a single transaction, than a regular account book containing the minutes of his business from day to day. . . . Undoubtedly the practice has been very lax on this point . . . and the explanation . . . is to be found in the fact that the great cheapness and convenience of this mode of proof has insensibly introduced a laxity in the practice, which the courts in question found it difficult to limit to the cases for which such evidence was originally designed. We have already held that there is no par-

ticular form in which the account book of a party must be kept; *Cummings v. Nichols*, 13 N. H. 420; and we are desirous of adapting the rule regulating the admission of it to the practical business of life, so far as that may be done without violating the principle that a party shall not be a witness in chief in his own case." *Richardson v. Emery*, 23 N. H. 220 (1851).

A time-book which had only the name of the party and marks under particular dates, has been received. *Mathes v. Robinson*, 8 Metc. 269 (1844); *Dicken v. Winters*, 169 Pa. St. 126 (1895).

In Maine, marks on a shingle or notches on a stick have been received. *Kendall v. Field*, 14 Me. 30 (1836). So of an account-book where statements of weight, &c., were omitted from the items. *Hooper v. Taylor*, 39 Me. 224 (1855). So in Massachusetts, as to this last point. *Pratt v. White*, 132 Mass. 477 (1882).

Original entries of charges in a diary have been received as original entries. *Gleason v. Kinney*, 65 Vt. 560 (1893).

Even a letter may be "a sort of original entry." *Houghton v. Paine*, 29 Vt. 57 (1856).

But it has been held that the register of a loan agent is not a "book of account," but merely a private memorandum of the owner. *U. S. Bank v. Burson*, 90 Ia. 191 (1894).

If account-books offered in evidence are so kept as to be intelligible, there is no reason why they should not be equally admissible, whether kept by double or single entries, or by setting apart a page, or part of a page, for each customer and exhibiting in one view the whole account. *Toomer v. Gadsden*, 4 Strobb. (S. C.) 193 (1850).

A party is entitled to explain any peculiar or unusual marks appearing on his account-book. *Singer Mfg. Co. v. Leeds*, 48 Ill. App. 297 (1892).

"In the United States, a tradesman's book of original entries is in most jurisdictions received in evidence as *primâ facie* proof, when supported by the tradesman's oath." *White v. Whitney*, 82 Cal. 163 (1889); *Thomson v. Porter*, 3 Strobb. (S. C.) Eq. 58 (1850).

It is a requirement that the entry should be made in the course of business. *Karr v. Stivers*, 34 Ia. 123 (1871); *Thomson v. Porter*, 3 Strobb. (S. C.) Eq. 58 (1850).

The entry must not only be made in the course of business, but it must relate to the declarant's business. "The rule is hard enough to include merchants, shop-keepers, tradesmen, mechanics and farmers, in all that pertains to their callings. But it would be dangerous to open the door of admission wider than this. The inclination of the court is not to extend this kind of evidence beyond its succinct limits, and we think it has not been so far stretched as to include the casual sale of an article not in the

course of the parties' business, and of which it is usual to take other proof or evidence of sale. . . . It is much better to adhere to this practice than to overstep the ancient limits of the rule, sanctioned only through necessity, and then run the hazard of obliterating the only intelligible line of distinction." *Shoemaker v. Kellog*, 11 Pa. St. 310 (1849).

The entry is regarded as none the less "original" that the first actual record is made upon a slate, and afterwards transferred therefrom into the book offered, if practical convenience and the course of business require it. *Faxon v. Hollis*, 13 Mass. 427 (1816) — a case of work and labor brought by a blacksmith; *Barker v. Haskell*, 9 Cush. 218 (1852); *Landis v. Turner*, 14 Cal. 573 (1860); *Hall v. Glidden*, 39 Me. 445 (1855); *Pillsbury v. Locke*, 33 N. H. 96 (1856); *Redlich v. Bauerlee*, 98 Ill. 134 (1881).

So also where the original entries of a butcher were in the form of "chalk scores on the cart, stating to whom the meat was sold, and the quantity and price; from which scores, on the return of the cart on the same day, and before it went out again, it was the custom of the other partner to make entries in the book of original entries," the book was held admissible. *Smith v. Sanford*, 12 Pick. 138 (1831).

So where work was done by the servants of a painter, who testified that they brought home memoranda of the items of service and of the amount of paint furnished, and from these memoranda the charges were made in the book, it was held the book account was admissible. *Morris v. Briggs*, 3 Cush. 342 (1849).

The book offered is none the less a book of original entries, that it is made up from information originally furnished by loose memoranda. *Hoover v. Gehr*, 62 Pa. St. 136 (1869). Or "entered each day on a slate, by those doing it, or under whose eyes it was done." And where "the book-keeper entered these charges from day to day in the books and effaced them from the slate." *Stroud v. Tilton*, 4 Abb. Ct. of App. Dec. 324 (1866); *Nichols v. Vinson*, 9 Houst. 274 (1891); or that the account is kept by the use of simple straight marks, the maker being unable to write. *Miller v. Shay*, 145 Mass. 162 (1887). These memoranda need not, and usually cannot, be produced. *Landis v. Turner*, 14 Cal. 573 (1860).

But where sales were entered at the close of day upon a ledger from loose slips, by items which did not show the kind of goods sold, it was held that the ledger was not admissible as a book of original entries. *Way v. Cross* (Ia.) 63 N. W. 691 (1895). This ruling was correct upon other grounds.

The memoranda must be transferred to the book of original entries within a reasonable time.

Three days is not an unreasonable length of time. *Landis v. Turner*, 14 Cal. 573 (1860).

Where the plaintiff, a cord-wainer doing a very small business, made his charges "upon a slate until it was full, and in from two to four weeks from the time they were so entered, when the work was done, he transferred them to his book," it was held "properly received." *Hall v. Glidden*, 39 Me. 445 (1855).

Where the entries are transcribed from a pass-book "within a couple of days," when the plaintiff was sick, and every evening when he was well, it was held sufficiently contemporaneous. *Hoo-ver v. Gehr*, 62 Pa. St. 136 (1869).

Where entries are transferred from memoranda, it was held in an early case in Pennsylvania that the entries ought in each case to be transferred "at least in the course of the day succeeding" the day of entry on the memorandum, rejecting the book where some of the entries had been transferred on the third day. *Cook v. Ashmead*, 2 Miles (Pa.), 268 (1838).

ENTRIES MUST REST ON PERSONAL KNOWLEDGE. — The entry must be verified by the evidence of the person who made the entry or appropriate proof of his handwriting. *State v. Hopkins*, 56 Vt. 250, 258, (1883); *Countryman v. Bunker*, 101 Mich. 218 (1894); *Meeth v. Rankin Brick Co.* 48 Ill. App. 602 (1892); *F. H. Hill Co. v. Sommer*, 55 Ill. App. 345 (1894); *Skipworth v. Dryell*, 83 Hun, 307 (1894).

It is believed that the rule laid down in the supreme court of Mississippi in the following case is too liberal, unless the person on whose information the entry is made is also produced as a witness. "The rule is that to authorize the introduction of books of account as evidence of the facts entered, it must be shown that they have been fairly and honestly kept, that they are the books of a party engaged in the business to which they refer, that the entries were made in the usual course of business, at or about the time the facts entered transpired, that the entries are original and made by a party having knowledge of the facts entered, or that information thereof was communicated to the party by whom the entries were made by some person engaged in the business whose duty it was to transact the particular business and make the report thereof for entry on the books, and such report and entry must be made at the time of the occurrence or before the facts can be supposed to have passed from his recollection." *Chicago R. Co. v. Provine*, 61 Miss. 288 (1883). "Plaintiffs' books of account will not be excluded on the ground that plaintiffs kept a clerk during the time of the dealings which were the subject of the action, where plaintiffs testify that, during such time, they did not keep a regular clerk, but sometimes employed persons to help them for a few days or months, and also employed persons to assist temporarily in posting the books, and that the book entries by others than plaintiffs were made under their supervision, in their presence,

and at their suggestion, though they state on cross-examination that they cannot say that they were always present when the charges in the books were made, or that they saw or gave directions as to every charge." *Atwood v. Barney*, 29 N. Y. Sup't. 810 (1894).

This requirement that the entry must have been based upon the personal knowledge of the declarant must necessarily be relaxed where, as frequently happens, the entry is made by one person upon information furnished him, and the remainder of the transaction is completed by another. Under these circumstances, if the party making the entry can testify that he has accurately entered what he was told (or, in case of his decease, if his handwriting and, possibly, general accuracy be proved) and the truth of the information which was entered, be testified to by those on whose knowledge it rests, it will be sufficient verification of the account.

"The decided cases have also sanctioned the rule that where there is more than one individual connected with the sale and delivery of the goods, and the making of the charges on the book, it is proper to introduce as witnesses all those persons who are thus connected with the transaction, and whose testimony is necessary to establish those facts which would be required to be proved by a single person, when such person had been the sole actor, as vendor and book-keeper." *Harwood v. Mulry*, 8 Gray, 250 (1857); *Miller v. Shay*, 145 Mass. 162 (1887); *Littlefield v. Rice*, 10 Metc. 287 (1845); *Faxon v. Hollis*, 13 Mass. 426 (1816); *Smith v. Sanford*, 12 Pick. 139 (1831); *Morris v. Briggs*, 3 Cush. 342 (1857); *Barker v. Haskell*, 9 Cush. 218 (1852).

A foreman, having general charge of the work, with two gang-foremen under him, each in charge of a separate gang, kept a time-book, in which was entered the name of each man employed; visited the work twice a day, and checked off on the time-book the time of each man as reported to him by the gang-foremen, recognizing some workmen by their faces. The gang-foremen did not see the entries, but testified that they had correctly reported the time of each workman to the general foreman. Held, that the book was admissible, in connection with the evidence of the general foreman. "We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially

by this method of accounts, that business transactions in numerous cases are authenticated, and business could not be carried on and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not personally cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or, for other reasons, it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified, as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice. We are of opinion, however, that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested." *Mayor, etc., of N. Y. v. Sec. Ave. R. R. Co.* 102 N. Y. 572 (1886). The evidence of the person having actual knowledge of the time employed is necessary, even if such person is without the state. *Little Rock Granite Co. v. Dallas Co.* 66 Fed. Rep. 522 (1894.)

Where logs were measured as they were sawed, and a memorandum of their contents marked on them by the party sawing, and at the end of each week the figures on the board were transcribed into a book by one of the measurers, who, however, could not recognize the work of the other measurers by their figures on the boards, it was held that the book was not evidence of the quantity of logs sawed without calling all the parties who had measured the logs. *Leslie v. Hanson*, 1 Hannay (New Bruns.) 263 (1867); *Chicago Lumbering Co. v. Hewitt*, 64 Fed. Rep. 314 (1894).

The rule being considered has no application to the case, where, though the actual entry is made by B., its accuracy has been ascertained by A. who has reported the facts which are the basis of the entry to B. In such a case the evidence of A. is sufficient.

Thus where a witness took down upon a slate the quantity in each stick of timber drawn by him, added up the several quantities, and gave their sum to his wife or daughter, who entered it in his presence upon a memorandum book, and he then examined the

entries and found that they were correct, it was held that the book might be submitted to the jury in connection with the testimony of the witness as competent to show the quantity drawn by him. *Pillsbury v. Locke*, 33 N. H. 96 (1856).

ENTRIES MUST BE CONTEMPORANEOUS. — As in the case of the shop-book, the entry must be made at substantially the same time as the transaction. It is for this reason, in part, that the book of original entry is alone admissible. *Bentley v. Ward*, 116 Mass. 333 (1874); *Davis v. Sanford*, 9 All. 216 (1864); *Martin v. Nichols*, 54 Mo. App. 594 (1893); *Collins Bros. Drug Co. v. Graddy*, 57 Mo. App. 41 (1894); *Railway Co. v. Murphy*, 60 Ark. 333 (1895); *Skipworth v. Dryell*, 83 Hun, 307 (1894). The onus of showing this, as other requisites of admissibility, is on the party offering the account. *Brown v. Williams (Tex.)*, 31 S. W. 225 (1895). In an action against an estate upon a book account for "drinks," "billiards," etc., the court say, "It was shown that the other entries in the books were in the handwriting of the appellee, but there was no evidence to show that the entries made by him were cotemporaneous with the transaction of the matters to which they relate." *Baldrige v. Penland*, 68 Tex. 441 (1887).

It is not fatal that a physician's book of charges contains entries in which the work of several days for the defendant is consolidated. "The charges of \$5, in several instances, embracing services of two or three days, are neither contrary to law nor the practice that prevails with men who keep their books of account at home, while their labor and services are rendered elsewhere." *Bay v. Cook*, 22 N. J. L. 343, 353 (1850).

Where a laborer works by the day for a single employer, it is sufficient if he sets down his time at the end of the week. He "ought not in reason to be held to make daily entries in his books." *Yearsley's Appeal*, 48 Pa. St. 531 (1865).

In a Massachusetts case where the entries were made up from daily memoranda furnished by the servants, "sometimes on the day, sometimes every two or three days, and one or two at longer intervals," the entries were admitted. *Morris v. Briggs*, 3 Cush. 342 (1849).

"In this particular, every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries." *Barker v. Haskell*, 9 Cush. 218 (1852).

PROOF OF ENTRY. — If the party making the entry be alive, he must be produced.

To entitle a memorandum to be read in evidence, it is indispensable that the witness should verify the handwriting as his own. *Gilchrist v. Brooklyn Grocers' Man. Assoc.* 59 N. Y. 495 (1875).

If the clerk or writer is available as a witness, he must be produced. *Bartholomew v. Farwell*, 41 Conn. 107 (1874). Or his absence satisfactorily accounted for. *Price v. Garland*, 3 N. M. 285 (1885).

A dictum in Connecticut suggests that in the case of a "book debt," the evidence of the person making the entry, even if available as a witness, is not required. *Bartholomew v. Farwell*, 41 Conn. 107 (1874).

Where the clerk is dead, his handwriting should be proved. *Stroud v. Tilton*, 4 Abb. Ct. of App. Dec. 324 (1866); *McDonald v. Carnes*, 90 Ala. 147 (1890).

"Where the entries are in the hand-writing of a deceased person, it is not enough, under any of the cases, for the administrator to swear to the general conclusion that the books came to his hands as administrator as the books of original entry of his intestate, and that he believes the debt was unpaid." In all such cases there must be proof of the handwriting of the deceased, whether principal or clerk. *Robinson v. Dibble*, 17 Fla. 457 (1880).

If the party making the entry is deceased, or otherwise incompetent, his handwriting should be proved. *Hoover v. Gehr*, 62 Pa. St. 136 (1869); *Union Bank v. Knapp*, 3 Pick. 96, 106 (1825).

If the person who made the entry is "dead or beyond reach, or incompetent, his testimony is dispensed with *ex necessitate*." *Bartholomew v. Farwell*, 41 Conn. 107 (1874).

And this is true, though the entry was originally made upon information furnished by another person who delivered the goods, performed the work, etc., provided such second person is presented as a witness. *Hoover v. Gehr*, 62 Pa. St. 136 (1869). It is also settled that "original entries made by a person in his own books, or made by his clerk, when done in the ordinary course of business, and contemporaneously with the transaction to which such entries relate, are generally admissible in evidence to prove the correctness of all items within the knowledge of the person making them. Before admissible, the entries must be sworn to as having been made by the party who made them, and that he knew of their correctness at the time they were made, if such party is living."

It has been said in an early case, that it is not sufficient to admit proof of his handwriting that the writer is without the state. *Douglass v. Hart*, 4 McCord, 257 (1827).

But being beyond the reach of process has generally been regarded as a satisfactory reason for admitting evidence of handwriting.

Where a partner named Buck, in whose handwriting certain entries were, had gone to parts unknown, the court in admitting evidence of his handwriting say, "The same necessity therefore existed for receiving the books in evidence that would have existed

if Buck had been dead at the time of trial." *New Haven &c. Co. v. Goodwin*, 42 Conn. 230 (1875).

Other excuses will be accepted for the non-production of the evidence of the person who made the entry.

So where a party is insane, the account is admissible as proof of his handwriting verified by the oath of the guardian. Whether the person is sufficiently insane to justify admitting the evidence is a preliminary question of fact for the presiding justice. *Holbrook v. Gay*, 6 Cush. 215 (1850); *Union Bank v. Knapp*, 3 Pick. 96, 108 (1825).

If he is dead, or insane, or beyond the jurisdiction of the court, proof of his handwriting will be sufficient. *Bolling v. Fannin*, 97 Ala. 619 (1893).

NATURE OF CHARGE. — Even where account-books are freely admitted, regardless of amount, certain of the old limitations upon the use of shop-books are still retained, as to the nature of the charge in proof of which such books are admissible.

For example, in New York, account-books are not admissible in proof of items of cash. "The rule which prevails in this state (adopted, it is said, from the law of Holland), that the books of a tradesman, or other person engaged in business, containing items of account, kept in the ordinary course of book-accounts, are admissible in favor of the person keeping them, against the party against whom the charges are made after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. . . . The rule admitting account-books of a party in his own favor in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property, or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate. But the same necessity does not exist in respect to cash transactions." *Smith v. Rentz*, 131 N. Y. 169 (1892).

"The book to be admissible, it is said, must be a registry of business actually done, and not of orders, executory contracts and things to be done subsequent to the entry." *Hart v. Livingston*, 29 Ia. 217 (1870). It was accordingly held that an entry, "Bo't of Livingstons 25 fat hogs, 12 head delivered immediately, balance when fattened, pd. \$15.00," was not admissible. *Ibid.*

A United States marshal's book of fees and disbursements is competent in favor of his administration. *Kinney v. U. S.*, 54 Fed. Rep. 313 (1893).

"Nor is it any objection . . . that the labor and services charged were performed under a special contract as to the price." *Swain v. Cheney*, 41 N. H. 232 (1860).

If the correctness of the original entries is proved, they may be shown by secondary evidence in case of their destruction by fire. *Ins. Co. v. Weide*, 9 Wall. 677 (1869).

If the shop-book is otherwise competent, it is not necessarily fatal that other outside accounts are put in at the close of the shop account. *White v. Whitney*, 82 Cal. 163 (1889).

STATUTORY EXTENSION. — Much of the rapid growth of this branch of the law has resulted from statutory enactment. *Hancock v. Hintrager*, 60 Ia. 374 (1882); *Wall v. Dovey*, 60 Pa. St. 212 (1869).

COLLATERAL FACTS. — Whether an entry in course of business is evidence of collateral facts is in dispute.

That A. is debited on the plaintiff's books is not "conclusive evidence that the credit was given to him, but only a circumstance, strong it is true, to be submitted with all the other evidence in the cause to the jury." *Myer v. Grafflin*, 31 Md. 350 (1869).

That the plaintiff debited a person other than the defendant is admissible as being "in the nature of admissions." *Bentley v. Ward*, 116 Mass. 333 (1874).

A plaintiff's books are not evidence to prove a promise of payment by the defendant. *Somers v. Wright*, 114 Mass. 171 (1873).

A charge on a plaintiff's books is not conclusive as to the person to whom credit was given. *Gilbert v. Porter*, 2 Kerr (New Bruns.) 390 (1844).

A book account is said not to be "evidence in reference to the amount of the claim due to the other party, and of the true state of the account between the parties." *Alexander v. Smoot*, 13 Ired. L. (N. C.) 461 (1852).

CONFIRMATION ALIUNDE. — "The rule requires, in addition, the suppletory oath of the party, and that it must be proved *aliunde*, that he was in the habit of keeping correct and just accounts." *Burleson v. Goodman*, 32 Tex. 229 (1869). "In order to entitle books of account to reception as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and that they are designed at least to embrace all the items of the account which are proper subjects of entry." *Countryman v. Bunker*, 101 Mich. 218 (1894).

In a Georgia case, in reversing judgment for the plaintiff, the court say: "To say nothing of the character and condition of the books themselves, not a witness swears that he kept correct books from his own knowledge of his dealings; nor does any one depose that he knew of any dealings between Cheever and Brown. To

allow a thousand dollars to be recovered upon such proof, would perhaps be going too far." *Cheever v. Brown*, 30 Ga. 904 (1860).

It is immaterial that the witnesses who testify to the general correctness of the plaintiff's books settled their own accounts by the ledger or did not verify the original entries. *Stroud v. Tilton*, 4 Abb. Ct. of App. Dec. 324 (1866).

It is sufficient confirmation if the plaintiff call as witnesses several persons who have kept the books offered in evidence, "and who testified that the books were correctly and accurately kept, and on these books were daily entered the items. . . . It is no longer necessary to call as witnesses others who have settled by the books." *Seventh Day &c. Association v. Fisher*, 95 Mich. 274 (1893).

The testimony of a book-keeper to the accuracy of his accounts has been regarded as a sufficient verification. *Cleland v. Applegate*, 8 Ind. App. 499 (1893).

Testimony of witnesses that they had dealt with plaintiffs, and had settled from plaintiffs' books of account, which they found to be correct, is sufficient evidence that the books were fairly and honestly kept to authorize their admission in evidence." *Atwood v. Barney*, 29 N. Y. Supp. 810 (1894).

"The presumption, *prima facie*, is, that the book of a decedent was regularly kept as a record of his daily transactions. If testimony is subsequently introduced which raises any question upon the subject it is for the jury to determine, under proper instructions from the court." *Hoover v. Gehr*, 62 Pa. St. 136 (1869).

PRELIMINARY INQUIRIES FOR THE COURT. — As with other matters of fact, incidental to the receipt of evidence, the preliminary inquiries relating to this class of evidence must be decided by the court. "Such private entries of a party himself, made in the regular routine of his business, are considered, especially in modern times, as legal testimony, however weak it may be regarded, if upon inspection of the books by the court trying a cause, they appear to have been honestly kept, and the entries, without erasures or interlineations, regularly and chronologically made." *Burleson v. Goodman*, 32 Tex. 229 (1869). "It is for the court to decide upon the admissibility of the book offered, although the weight to be given to it afterwards must be largely a question for the jury, in connection with its appearance, the manner in which it is kept, and the other evidence in the case. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been the record of the daily business of the party, made for the purpose of establishing a charge against another. Necessarily, regard is to be had to the education of the party, his methods and knowledge of business, etc., in deciding this question. *Cogswell v. Dolliver*, 2 Mass. 217; *Prince v. Smith*, 4 Mass. 454.

The decision of the court to admit the book is final and conclusive, unless from its character, or from that which was sought to be proved by it, it could not have been admitted even if it met those tests." *Pratt v. White*, 132 Mass. 477 (1882).

In Florida the rule is stated thus: "Originally book accounts were not admissible in evidence in this state. *Higgs v. Shehee*, 4 Fla. 382. Subsequently to this decision the Legislature passed an act that shop books of account of either party, in which charges and entries shall have been originally made shall be admissible in evidence in favor of such party, and the credibility of such evidence shall be judged of by the jury in cases at law, and by the court in cases of equity. Chapter 662, Acts of 1854, Revised Statutes sec. 1120. Under this statute, as construed by our decisions, before the books can be admitted in evidence they must be submitted to the inspection of the judge, accompanied with proof that the entries therein were originally made, that is, made by the party contemporaneous with the transactions therein recorded, in due course of his business, and if they exhibit a fair register of the daily business of the party, and appear to have been honestly and regularly kept, they are admissible as evidence to be judged of by the jury." *Lewis v. Meginniss*, 30 Fla. 419, 428 (1892).

The party against whom such entries are offered may call the attention of the court to inaccuracies and circumstances of suspicion in the entries of the book, even as to accounts other than the one offered in the case.

If the book is admitted to go to the jury, the party can introduce intrinsic or extrinsic evidence as to the accuracy and good faith of the book as to the account in litigation or any other, open or closed. "When a book of original entries is offered in evidence, supported by the oath of the party, the court examines it to see if it appears, *primâ facie*, to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompetent: *Churchman v. Smith*, 6 Whart. 146; *Curren v. Crawford*, 4 S. & R. 3. If this does not clearly appear, it is to be submitted to the jury to judge of, and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time, or near the time, covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book. If a shop-book exhibit, in respect to customers generally, illegal dates,

as on Sunday, or impossible dates, as 31st of June or 30th February, or altered dates, or earlier dates after those that are later, or any other such condemning features, they are evidence for the jury upon the general character of the book. The jury may form some opinion from such examination, how far it is entitled to weight in the scales which they are holding. Whilst they should make all due allowances for mistakes, for ignorance and unskilfulness in book-keeping, and for peculiarities in the plaintiff's business, they should insist on the general honesty and accuracy of the book, made in secret by one party against the other, and now offered as a guide to the conscience of the jury." *Funk v. Ely*, 45 Pa. St. 444 (1863).

WEIGHT FOR THE JURY. — Once admitted, the evidence of account-books is entitled to such weight as the jury see fit to give it. "Of these attributes and pre-requisites of the book accounts of parties, the judge who tries the cause and has the opportunity to inspect them, is better qualified to form an opinion than this court, unless the books themselves are brought under review here. When they are admitted before the jury, as testimony, the jury alone are to be the judges of the weight to be given to them." *Burleson v. Goodman*, 32 Tex. 229 (1869); *Dicken v. Winters*, 169 Pa. St. 126 (1895).

Entries in Course of Business. — Prominent among exceptions to the hearsay rule is that which admits oral declarations or written entries made by a deceased person in the usual course of professional or official business, or in discharge of some duty.

"We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." *Nicholls v. Webb*, 8 Wheat. 326, 337 (1823). On an action by indorsee of a promissory note against an indorser demand and notice may be proved by an entry of a notary's clerk since deceased. "It has been recently settled, that the memorandums made at the time by a person in the ordinary course of his business, of acts and matters which his duty in such business required him to do for others, are admissible evidence of the acts and matters so done after his death." *Farmers' Bank v. Whitehill*, 16 S. & R. 89 (1827).

In a similar case, a protest of a note found among the papers of a deceased notary public is good evidence of the demand and notice.

"Notaries are usually employed for that purpose by holders of notes, and are trustworthy persons conversant with such business, and therefore suitable and proper agents to be so employed; and their written memoranda, after their decease, though not competent evidence in chief, yet from necessity are good secondary evidence, because it is the usual course of their duty and business to keep such memoranda." *Porter v. Judson*, 1 Gray 175 (1854).

See also *Shove v. Wiley*, 18 Pick. 558 (1836), where no attention is apparently paid by the court to the fact that the writer was alive.

Entries in the private book of a deceased town treasurer made in the usual course of his official duty, are competent. *Rindge v. Walker*, 61 N. H. 58 (1881).

Entries in the account book of a deceased physician of charges for services as a surgeon in setting a fractured leg, made in course of business are competent evidence, in a pauper settlement case, though not against the interest of the declarant. *Augusta v. Windsor*, 19 Me. 317 (1841).

Entries by a deceased jeweller as to the repairs, number, make, &c., of a certain watch, made according to the course of his business, are competent evidence of the facts set forth. *State v. Phair*, 48 Vt. 366 (1875).

"The entry by an attorney in his register of the making of an order or decree in a proceeding conducted by him, is admissible within this rule. The order or decree is the act of the court, but it is procured upon the application of the attorney, and the fact of obtaining it is a part of the history of the proceeding, which prop-

erly and usually is inserted in the register. There is no absolute duty resting upon an attorney to make such an entry, but this is not essential, it is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it." *Fisher v. Mayor*, 67 N. Y. 73, 77 (1876).

So an entry of demand of payment of a certain note made in a book kept, as required by the by-laws of the bank by a deceased messenger, is competent evidence of demand. *Welsh v. Barrett*, 15 Mass. 379 (1819).

The record of a station agent as to the movement of freight cars at his station, made in the course of his duties as agent of the company, is competent. *R. R. Co. v. Henderson*, 57 Ark. 402 (1893).

It is not necessary that the duty should be one which is prescribed by law.

The entry of a baptism, contemporaneously made by a Roman Catholic priest, in the discharge of his ecclesiastical duty, in his church record of baptisms, is competent evidence, after his death of the date of the baptism, if the book is produced from the proper custody; although he is not a sworn officer, and the record is not required by law to be kept. *Kennedy v. Doyle*, 10 All. 161 (1865). "In the case before us, the book was kept by the deceased priest in the usual course of his office, and was produced from the custody of his successor; the entry is in his own handwriting, and appears to have been made contemporaneously with the performance of the rite, long before any controversy had arisen, with no inducement to misstate, and no interest except to perform his official duty. The addition of a memorandum that he had been paid a fee for the ceremony could not have added anything to the competency, the credibility, or the weight, of the record as evidence of the fact. An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor, or a physician, in the course of his secular occupation." See also *Whitcher v. McLaughlin*, 115 Mass. 167 (1874).

So the official registers kept by public officers for entry of official transactions to discharge the duties of their offices are admissible, though no statute requires the books to be kept. *Bell v. Hendrick*, 25 Fla. 778 (1889).

"Official records, or books kept by persons in public office, in which they are required to write down the proceedings of some public body or corporation, are generally admissible in evidence, although their authenticity be not confirmed by an oath, or the power of cross-examining the persons on whose authority their truth and correctness depend." *Little v. Downing*, 37 N. H. 355 (1858).

But it is requisite that there should be a duty of some kind. A self-imposed, optional task does not come within the rule. Thus the supreme judicial court of Massachusetts has refused to admit entries made by a deceased person of payments of money entered in a diary in which he made daily entries. *Costelo v. Crowell*, 139 Mass. 588 (1885).

The book must have a "connection with the business of the plaintiff." *Avery v. Avery*, 49 Ala. 193 (1873). So a lawyer cannot fix a date by proof of an entry in his diary, though such entry might be used to refresh his recollection. *Whitaker v. White*, 69 Hun, 258 (1893).

Where the owner of a business, suspecting that an employee was not accounting to him for sales, had another employee make a list of sales on a slip of paper, it was held that this was not an entry in course of business. *Peck v. Valentine*, 94 N. Y. 569 (1884).

EVIDENCE OF COLLATERAL FACTS. — The declaration is not only evidence of the precise fact which it was the duty or custom of the declarant to enter, but of collateral facts stated at the same time.

So the entry on the baptismal register of a Roman Catholic priest "1837, December 17th. Baptized Joanna, born 12th," is evidence not only of the date and fact of baptism, but of the date of birth, though it was no part of the priest's duty to record the date of birth. *Kennedy v. Doyle*, 10 All. 161 (1865). Entries on the books of a deceased jeweller, showing the charges for repairs made on a certain watch, are competent evidence of its number, maker, style, &c., in any suit where such facts are material. *State v. Phair*, 48 Vt. 366 (1875).

On the contrary, it has been held in Pennsylvania, that the record of a Lutheran minister showing the burial record of certain persons was incompetent to show the names of their parents, their birthplaces, and the dates of birth, though this "was the usual way of keeping the record." The court say: "This burial list was competent to show the death and burial of these ladies, but what the pastor put down in the book as to their parentage, and the time and place of their birth, was incompetent, for the plain reason that it was no part of his duty to make such entries. Such registers are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer." *Sitler v. Gehr*, 105 Penn. St. 577, 600 (1884).

"Apart from any statute requiring it, the baptismal register of a church, in which entries of baptism are made in the ordinary course of the clergyman's business, is admissible to prove the fact and date of baptism, but not to prove other facts, as, ex. gr., that the child was baptized as the lawful child of the parents, and hence to infer a marriage between them." *Blackburn v. Crawfords*, 3 Wall. 175 (1865).

So it has been held in Michigan that "the record of a baptism, when admissible in evidence, is evidence of the date of baptism, but not of birth, although stated therein." *Durfee v. Abbott*, 61 Mich. 471 (1886). And, in the same court, that a book entry cannot be used as evidence not only of a certain payment, but also that it was "in full." "It is well settled that such an entry cannot prove anything more than the charge of such an amount, if it proves that. Any further entry can have no weight to prove such a settlement as is relied on here. Book-entries, when receivable, are not allowed beyond the purpose for which the exception in their favor is made in the usual course of business." *Estate of Ward*, 73 Mich. 220 (1889).

And it has been held that a stranger cannot be a declarant of a man's age, — *e. g.*, the secretary of a lodge cannot make his statement of the age of an applicant upon the lodge books evidence of such age. *Connecticut, &c., Ins. Co. v. Schwenk*, 94 U. S. 593 (1876). Similarly, on an indictment for cohabitation with a female under eighteen years of age, the annual reports of the clerk of the school district where the girl went to school — which stated the age of the pupils — were rejected, as the clerk "was not required to include in his report the names of the children or the actual age of any child." *State v. Woods*, 49 Kan. 237 (1892).

MUST BE CONTEMPORANEOUS. — If the declaration takes the form of a written entry, such entry must be made at substantially the same time as the occurrence of the fact which it purports to state. *Chaffee v. U. S.*, 18 Wall. 516, 541 (1873); *Kennedy v. Doyle*, 10 All. 161 (1865); *R. R. Co. v. Henderson*, 57 Ark. 402 (1893).

This must be shown by other evidence than the mere production of a surveyor's minutes. "The proposed evidence falls under the class of hearsay testimony, as to which the general rule is that it is inadmissible, to which rule, however, there are several exceptions, of which the present with certain qualifications is one. Business entries of deceased persons, when made in the line of their duty are admissible in evidence. This is the rule, but it is subject to the qualification that such entries to be admissible must be, first, original; and second, contemporaneous with the facts they record; and these requisites must be established by evidence other than what may be derived from the entries themselves. The field notes of a surveyor since deceased, made in the discharge of his official duties and contemporaneous with the survey, are admissible because such entries are made under a sense of business responsibility, and by an officer having no interest to make untrue entries.

It has been held that where an entry has been made against interest, proof of the hand-writing of the party and his death is enough to authorize its reception at whatever time it is made; but in the case of entries in the course of business, they must be

contemporaneous with the transaction, and if there is any doubt whether the entries were made at the time of the transaction, they are admissible." *Ray v. Castle*, 79 No. C. 580 (1878). The evidence that an entry was contemporaneous cannot be proved by a presumption arising from the contents of the entry itself. *Barton v. Dundas*, 24 Q. B. U. C. 273 (1865).

"When a witness is shown to be dead, or beyond the jurisdiction of the court, written entries and memorials of a transaction, entered in the usual course of business, and which are shown to be in the handwriting of the absent or deceased witness, and purport or are shown to have been made at or about the time of such alleged transaction, are admissible evidence, in any issue involving the transaction to which they relate." *Elliott v. Dycke*, 78 Ala. 150, 157 (1884).

Entries, if made by one party to a transaction after the transaction had been completed, are inadmissible. "The rights of the defendant could not be varied by entries thus made, because they were not contemporaneous entries, made in the due course of the business, as a part of the *res gestæ*, but were made by one of the parties after the rights of the other party had become fixed. *Burley v. German-Am. Bank*, 111 U. S. 216 (1883).

This requirement of contemporaneousness is the probable basis for saying that such declarations are admissible as part of the *res gestæ*. It may well be doubted, however, whether such a classification be not rather misleading than otherwise. To be part of some principal *res gestæ fact*, a declaration must also, it is true, be contemporaneous with such principal fact. But here its resemblance to a declaration in course of business ceases. The mere fact that an entry has been made contemporaneously with the transaction it sets forth, is not in itself circumstantial evidence of the truth of the statement concerning the transaction. The declarant must be dead; it must be made in the course of duty or business — none of which requirements are made as to a declaration part of the *res gestæ* or part of a *res gestæ fact*.

An interesting case in New Hampshire decides that an entry in a book of accounts, made in the usual course of business by a person since deceased, is admissible in a suit between third parties, there being evidence *aliunde* that he had means of knowledge, even if the entry be in his favor. On an action against a railroad company for a collision of a crossing, by which the plaintiff's wagon was injured, it became important for the plaintiff to show the character and extent of the injury to one of the hind wheels. One Woodward, a wheelwright, who repaired the woodwork of the wheel, died before the trial. The plaintiff called his administrator, who testified that he had Woodward's account book, kept by Woodward in his lifetime, on which appeared a charge "June 8th, 1887.

To sixteen spokes, twenty cents apiece, \$3.20." This was admitted, over objection, and held, correctly. "There is a distinction between entries made in the usual and regular course of business, and a private memorandum. The latter is mere hearsay, and inadmissible in evidence after the death of the person who made it. Entries made in the regular and usual course of business stand differently. When shop-books are kept and the entries are made contemporaneously with the delivery of goods or the performance of labor by a person whose duty it was to make them, they are admissible, unless the nature of the subject is such as to render better evidence attainable. Mr. Greenleaf says the remark that this evidence is admitted contrary to the rules of the common law is incorrect; that 'in general its admission will be found in perfect harmony with those rules, the entry being admitted only when it was evidently contemporaneous with the fact and part of the *res gestæ*.'" *Lassone v. Railroad*, 66 N. H. 345, 358 (1890).

DECLARANT MUST BE DEAD. — *Lewis v. Kramer*, 3 Md. 265 (1852); *State v. Hopkins*, 56 Vt. 250 (1883); *Smith v. Lane*, 12 S. & R. 80 (1824).

Where it appeared that certain entries of sales upon the books of a stock exchange offered in evidence in a suit between third parties, were written by a secretary who was alive and in the city of trial, the evidence was rejected. *Terry v. Birmingham National Bank*, 93 Ala. 599 (1890).

DISABILITY OTHER THAN DEATH. — The strict requirement that the declarant must be dead in order to render his declaration admissible has been greatly relaxed in the United States.

It is sufficient if the declarant is insane. *Chaffee v. U. S.* 18 Wall. 516, 541 (1873).

Or "beyond the reach of the process or commission of the court." *Chaffee v. U. S.*, 18 Wall. 516, 541 (1873); *James v. Wharton*, 3 McLean, 492 (1844); *Vinal v. Gilman*, 21 W. Va. 301 (1883).

Or has absconded to parts unknown. "Under these circumstances we think it is clear that, by the law of this state, the books should have been received in evidence without the testimony of Buck in regard to them. He had gone to parts unknown, and could not be produced as a witness. The same necessity therefore existed for receiving the books in evidence that would have existed if Buck had been dead at the time of trial. If such had been the case they would undoubtedly have been evidence." *New Haven Co. v. Goodwin*, 42 Conn. 230 (1875); *North Bank v. Abbot*, 13 Pick. 465 (1833).

Such entries have been held admissible even if the declarant is alive and present in court. *Chaffee v. U. S.*, 18 Wall. 516, 541 (1873).

Apparently, such is the effect of the decision by the supreme

judicial court of Massachusetts in *Shove v. Wiley*, 18 Pick. 558 (1836) where the entries of a bank messenger showing the giving of notice to an indorser, were held admissible on being identified by the messenger as in his handwriting and undoubtedly correct when made; though the messenger had no independent recollection of the occurrence.

The court seem at times during their opinion inclined to treat the entry as a memorandum to refresh recollection, and the decision seems sounder when rested upon that ground.

It is said that it will be presumed that a deceased clerk, who made the entry on a merchant's books, delivered the goods. *Clarke v. Magruder*, 2 Har. & Johns. 77 (1807).

PERSONAL KNOWLEDGE REQUIRED. — It is essential that the declaration should be by one who has personal knowledge of the existence of the fact which he declares.

Accordingly, on an action against distillers for selling untaxed gallons of whiskey, shipped over the Miami Canal, the government is not allowed to put in evidence entries in the certificate books of certain collectors of tolls on the canal, in the handwriting of deceased clerks, showing the arrival of freight at their respective ports, where these entries were made up principally from information furnished by the freight bills presented by the captains, and occasionally from the simple statements of the captains themselves if deemed reliable, many of the captains not being produced, or accounted for, at the trial. "If now we apply the rule which we have mentioned to the certificate-books of the canal collectors their inadmissibility is evident. They were not competent evidence as declarations of the collectors, for the collectors had no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility." *Chaffee v. U. S.*, 18 Wall. 516, 543 (1873).

A record, made in course of business, of the amount of plaintiff's flour delivered to the defendants, kept by a miller's book-keeper, and frequently made up from memoranda filed with him by some one who had delivered flour in his absence, are not competent. *Smith v. Lane*, 12 S. & R. 80 (1824).

If, however, A. can testify to the existence of a fact, and that he correctly reported it to B., B.'s entry, in the usual course of business, is admissible, in connection with A.'s testimony, after B.'s decease.

An excellent illustration of the extent to which modern methods of doing business have forced a modification of the requirement of personal knowledge may be found in *Mayor &c. of New York v. Second Avenue R. R. Co.*, 102 N. Y. 572 (1886). The action was one of contract to recover against the defendant for work and materials in paving the tracks of the defendant road. In attempting to prove these, the city introduced a time-book, kept by one John B. Wilt, a foreman in the employ of the department of public works. In this book he entered the name of each man employed. He visited the work twice a day, checked the time of each man as represented to him by the two gang foremen or head bosses. The latter did not see Wilt's entries. Wilt said that he knew the faces of the men and checked them off. Gang foremen testified that they had reported time correctly. The judge admitted book. He also admitted an account in Wilt's handwriting of materials used. This was made up in the same general way, except that the gang foremen claimed no present knowledge of the quantity. They said they had reported correctly. One said that the count of stone was reported to him by the carmen who drew it, but not verified by him. The carmen were not called. As to this last item, the court say that it was mere hearsay, and if a specific objection had been taken against it that it would have been good. But being general, and the others being good, that also must be overruled. Court say business is, and must be carried on in way mentioned. It is "an account kept in the ordinary course of business, of laborers employed in the prosecution of work based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master but of higher grade, who, in time, also in accordance with his duty, entered the time as reported." *Mayor &c. of N. Y. v. Second Ave. R. R. Co.*, 102 N. Y. 572 (1886).

"But at common law, where the clerk who made the entries had no knowledge of the correctness of the entries, but made them as the items were furnished by another, it was essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof (such as the transactions were reasonably susceptible of) from other sources should be produced." *Stettauer v. White*, 98 Ill. 72 (1881).

Whether a surveyor's minutes would be evidence where a chain bearer "called off" without producing the chain bearer, see *Ray v. Castle*, 79 N. C. 580 (1878).

PROOF OF ENTRY. — That the entry in course of business was actually made by the deceased person whose declaration it purports to be, may be shown by proof of his handwriting. *Chaffee v. U. S.*, 18 Wall. 516, 541 (1873); *Welsh v. Barrett*, 15 Mass. 379 (1819).

But a copy in the handwriting of a clerk cannot be proved by evidence of his handwriting. *James v. Wharton*, 3 McLean, 492 (1844). "This is not a book of original entries, but a mere transcript from that book, made by a clerk, who did not make those entries. The ground on which alone proof of the handwriting of the clerk gives validity to the book of accounts is, that it is the book of original entries; that the clerk is supposed to be cognizant of the transactions which it records; and, that the entries made by him, were made at or near the time they purport to have been made; and are, therefore, a part of the *res gestæ*. As a mere copy, made by a clerk who did not keep the original book, proof of his handwriting in no way conduces to establish the authenticity of the book offered in evidence; and it is, therefore, excluded from the consideration of the jury."

See also *Creswell v. Slack*, 68 Ia. 110 (1885).

In *R. R. Co. v. Henderson*, 57 Ark. 402 (1893), the entries of a deceased clerk must, it is said, "be authenticated by his oath if he is living and his testimony can be procured. If he is dead, or is out of the jurisdiction of the court, or cannot be found, they may be admitted on proof of his hand-writing."

AN EXTENDED DEVELOPMENT. — It is easy to recognize a progressive tendency toward extending the rule so far as to include all writings made in the course of business and without motive to deceive.

The distinction has not in all cases been observed between the rules governing account books on behalf of a party or memoranda to refresh the recollection of a witness and the rule under consideration.

The supreme court of the United States, speaking of the entries on the books of collectors of tolls on a canal made in the usual course of business, lay down the rule as follows: — "Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.

And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the court. The testimony of living witnesses personally cognizant of the facts of which they speak, given under the sanction of an oath in open court, where they may be subjected to cross-examination, affords the greatest security for truth. Their declarations, verbal or written, must, however, sometimes be admitted when they themselves cannot be

called, in order to prevent a failure of justice. The admissibility of the declarations is in such cases limited by the necessity upon which it is founded." *Chaffee & Co. v. U. S.*, 18 Wall. 516, 540 (1873).

The books of a bank showing the state of a depositor's account have been admitted, in a well considered Indiana case, under a line of reasoning which would practically admit any account book kept in the usual course of business as evidence *per se*; and it is probable that such, under certain safeguards, is destined to become the settled state of the law on this subject. "The next question for consideration is the exception of the appellant to the ruling of the court to the admission in evidence of the entries in the books of the First National Bank made in the usual course of business, showing the state of the account of said Moses C. Culver at and subsequent to the execution of the checks sued upon. As preliminary to the introduction of the entries in these books in evidence, it was shown by the clerks and officers of the bank produced in court as witnesses, and as to the entries made by such witnesses, that they were, at the time the entries were made, the proper and authorized book-keepers to make such entries; that the entries were made by them in the due course of business in the discharge of their duties, and were correct when made; that the entries made by them were original, and entered by them in books kept for that purpose, and that they had no recollection of the facts represented by the entries.

As to the entries made by parties who were not witnesses, it was shown that the enterer was, at the time the entry was made, the proper book-keeper and agent of the bank to make the entries in the due course of business, that the entries were original entries on original books made by such book-keepers in due course of business, and were in the known handwriting of such book-keepers, and that the enterer was dead or a non-resident of the State of Indiana. After the making of such preliminary proof the entries were admitted in evidence over the objection of the appellant. . . .

The bank with whom he did business, and upon which he drew the check, kept books and made an entry of all their business, of the money deposited by Culver, and checks drawn by him and paid by the bank. The books were kept by disinterested parties. Some of the persons who at the time of the transactions kept the books, took the deposit, and placed it to Culver's credit, paid the checks drawn by him, and entered them on the books or charged them to his account were dead, others were beyond the jurisdiction of the court, and others had no personal recollection of the transaction except to know that the books were kept in due course of the banking business, and were correct, and showed a correct statement of the account." *Culver v. Marks*, 122 Ind. 554, 562 (1889).

In the case of Fennerstein's Champagne, on an issue of the market value of certain invoices of champagne at the place of manufacture, a letter from a seller of similar champagnes at about the same place written to a third party has been received, though by a divided court, in the absence of evidence that the writer was deceased. "We think the letters in question in this case were properly admitted. In reaching this conclusion we do not go beyond the verge of the authorities to which we have referred. In some of those cases the person asserted to be necessary as a witness was dead. But that can make no difference in the result. The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates. In all he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence. We feel no disposition to contract the just operation of the rule here under consideration." *Fennerstein's Champagne*, 3 Wall. 145 (1865).

On the other hand, evidence of entries in an account-book by a deceased merchant, proved to be in his handwriting, have been rejected because, as is said, it is "a general rule of law that a party cannot make evidence for himself, and that a party cannot introduce his own declarations, oral or written, as evidence in his own behalf. . . . It is true that when entries have been made, in the usual course of business, by merchants' clerks, and such clerks are dead, these entries thus made are admissible as evidence; but we know of no case where such entries have been held admissible when in the hand-writing of the party himself." *Bland v. Warren*, 65 N. C. 372 (1871.)

The state of judicial feeling on this subject is thus given in 1 Smith's L. C. (9 Am. Ed.) 570.

"A party's own books of account and original entries are now, in most, if not all, of the United States, received as evidence of a sale and delivery of goods to or of work done for the adverse party. The practice is sanctioned in some jurisdictions by the decision of the courts; in others by express legislative enactment. But even in those states where it is admitted by force of the common law, it is regarded as a departure from the old common-law rule that a party shall not make evidence in his own favor, and if we may judge from the language of the Courts, is considered of questionable policy. The reason for its introduction has never been placed, by any court, on higher ground than that of necessity. For, in view of

the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible or leave the creditor remediless. But where a course of dealing between parties is shown to have existed, a degree of credit, more or less, will naturally attach to the registration by the proper person, in the proper book kept for such purpose, in the usual course of business, of such transactions as occur between them. The admission of books of account in evidence, therefore, under proper restrictions and limitations, is not calculated to produce injurious consequences. But, inasmuch as the situation and circumstances of trade are gradually becoming such as very much to diminish the reason of the departure from the common law rule, the Courts in some of the states are inclined to restrain rather than enlarge the exception itself; *Sickles v. Mather*, 20 Wend. 72; *Larue v. Rowland*, 7 Barb. 107; *Dunn v. Whitney*, 1 Farif. 9."

CHAPTER VIII.

DYING DECLARATIONS.

§ 714.¹ THE last of the six exceptions, which it has been pointed out² that there are to the general rule that hearsay evidence must be rejected, arises in the case of *dying declarations*. The principle on which evidence of this description is admitted is "that such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice."³ At one time an opinion prevailed that this general principle warranted the admission of dying declarations in all cases, civil and criminal.⁴ A contrary doctrine, however,

¹ Gr. Ev. § 156, in part.

² *Supra*, § 607.

³ *R. v. Woodcock*, 1789 (Eyre, C.B.); *R. v. Drummond*, 1784. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis, exclaim:—

"Have I not hideous death within my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me *now* deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here, and live hence by truth?"—

King John, Act 5, sc. 4.

⁴ Thus, the dying declarations of a subscribing witness to a forged instrument could be given in evidence to impeach it: *Wright v. Littler*, 1761 (Ld. Mansfield); which, however, as reported in Blackstone, stated that no general rule could be drawn from the admission of the evi-

dence in that particular case: Anon. (undated. Heath, J.), cited by Ld. Ellenborough (who apparently approved of it) in *Aveson v. Ld. Kinnaid*, 1805, and in *Bp. of Durham v. Beaumont*, 1808; explained by Bayley, J., in *Doe v. Ridgway*, 1820. Moreover, the dying declarations of

now prevails,¹ both in England and America, and evidence of this description is not admissible in any civil case. In criminal cases it is so only in the one case of *homicide*,² “where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration,”³ and where it is offered in the very words of the deceased, both questions and answers being given where questions have been put.⁴

§ 715. A strong instance of the admissibility of dying declarations as evidence in charges of homicide² is, that where a prisoner who was charged with the murder of A. had, in poisoning A., inadvertently also poisoned B. (which was in law a murder of B.), the dying depositions of B. were admitted as evidence for the prosecution on prisoner’s trial for the murder of A.,—for the act which caused the death of A. also caused that of B., and it was all one transaction.⁵ On the other hand, the principle that dying declarations are only admissible as evidence on charges of homicide² is shown by dying declarations of the party robbed having been rejected on a trial for robbery;⁶ and by her statements *in extremis* being held inadmissible on an indictment for administering drugs to a woman, with intent to procure abortion;⁷ while in Ireland, even on a trial for murder, the statement of a *third person*, who has on his deathbed confessed that he committed the offence, has been rejected.⁸ Where, too, a party, convicted of perjury, after obtaining a rule nisi for a new trial, shot the prosecutor, the court rejected an affidavit of the dying declarations of the latter, as to the transaction out of which the prosecution for perjury arose.⁹ As to civil cases, the dying declarations of a servant of the

a pauper respecting his settlement were once admissible: *R. v. Bury St. Edmunds*, 1784; *Abbotun v. Duns- well*, 1699. But this doctrine has long been exploded. See *R. v. Aber- gwyilly*, 1801; *Stobart v. Dryden*, 1836.

¹ See *Stobart v. Dryden*, 1836, where the cases cited in the preceding note were virtually overruled, and also cases cited in note ⁴, *infra*. See, too, *ante*, § 568.

² i. e., murder or manslaughter.

³ *R. v. Mead*, 1824; *R. v. Hind*, 1860; *Wilson v. Boerem*, 1818 (Am.).

⁴ *R. v. Mitchell*, 1892.

⁵ *R. v. Baker*, 1837 (Coltman, J., after consulting Parke, B.). The point could not be reserved, as prisoner was acquitted.

⁶ *R. v. Lloyd*, 1830.

⁷ *R. v. Hutchinson*, 1822 (Bayley, J.); *R. v. Hind*, 1860. In 1 Ph. Ev. 282, a statement that these declarations were held admissible is a mistake, corrected in later editions.

⁸ *R. v. Gray*, 1841 (Torrens, J.) (Ir.); but *cp. R. v. Baker*, note ⁵.

⁹ *R. v. Mead*, 1824.

party last seised, as to the relationship of such party with the lessor of the plaintiff, have been rejected in an action of ejectment.¹

§ 716.² The reasons for thus restricting the admission of this species of evidence may be,—first, the danger of perjury in fabricating declarations, the truth or falsehood of which it is impossible to ascertain,—secondly, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute “the *whole* truth,”—and thirdly, the experienced fact, that implicit reliance cannot in all cases be placed on the declarations of a dying person; for his body may have survived the powers of his mind;³ or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say, or seem to say, whatever they choose to suggest.⁴ As these, or the like considerations, are thought in ordinary cases to counterbalance the force of the general principle above stated, the exception to the general rule against admitting hearsay evidence, which is now under review, is restricted to cases of homicide, and is there recognised on the sole ground of public necessity. For as in such cases it often happens that no third person was present as an eye-witness to a murder, and as the party injured, who is the usual witness in other cases of felony, cannot himself be called, it follows that if his dying declarations could not be received, the murderer might often escape justice.⁵ It will be remembered, moreover, that the restriction of their admissibility to cases of homicide applies only to such declarations as are tendered merely because they were made in extremis. Declarations (whether made by a dying person or not) which constitute part of the *res gestæ*, or come within the exception of declarations against interest, or the like, are admissible as in other cases.

§ 717.⁶ Persons making dying declarations are considered as in the same situation as if they were sworn, the danger of impending

¹ *Doe v. Ridgway*, 1820.

² Gr. Ev. § 156, in part.

³ Thus, in *King John*, Prince Henry is made to say:—

“Death’s siege is now
Against the mind, the which he pricks and wounds
With many legions of strange fantasies;
Which, in their throng and press to that last hold,
Confound themselves.”—Act 5, sc. 7.

⁴ *Jackson v. Kniffen*, 1806 (Am.) (Am.).
(Livingston, J.).

⁶ Gr. Ev. § 157, in part.

⁵ 1 East, P. C. 353; 2 Johns. 35

death being equivalent to the sanction of an oath. Therefore, when the declarant, if living, would have been legally incompetent to testify (by reason of imbecility or tender age, &c.), his dying declarations are inadmissible.¹ On the other hand, as the testimony of an accomplice is admissible against his fellows, the dying declarations of a *felo-de-se* are admissible against one indicted for assisting the deceased in his self-murder.² And when a husband is charged with the murder of his wife, or a wife with the murder of her husband, the dying declaration of the deceased will be received.³

§ 718. It is essential to the admissibility of dying declarations, first, that the declarant should have been in *actual danger of death* at the time when they were made; secondly, that he should then have had a *full apprehension of his danger*; ⁴ and lastly, that *death should have ensued*.⁵ These three things must be proved to the satisfaction of the judge before a “dying declaration” can be received.⁶ It ⁷ is not, however, necessary that the declarant should have expressly said, in so many words, that he was speaking *under a sense of impending death*. It will be enough if it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as, for instance, if that fact can be reasonably inferred from the evident danger of the declarant,⁸ or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant’s mind.⁹ The length of time which elapsed between the

¹ *R. v. Pike*, 1829; *R. v. Drummond*, 1784.

² *R. v. Tinckler*, 1781.

³ *R. v. Woodcock*, 1789; *Stoop’s case*, 1799.

⁴ *R. v. Cleary*, 1862.

⁵ In *Sussex Peer.*, 1844, H. L., *Ld. Denman* thus laid down the law:—“With regard to declarations made by persons in extremis, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension, at the time, of the danger, and of death, such declarations can be received in evi-

dence; but *all these things must concur* to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination.”

⁶ *Ante*, § 23.

⁷ *Gr. Ev.* § 158, in part.

⁸ See *R. v. Morgan*, 1875 (*Denman, J.*). In *R. v. Bedingfield*, 1879, *Cockburn, C.J.*, declined to rely on such evidence. *Sed qu.*?

⁹ *R. v. Woodcock*, 1789; *R. v. John*, 1790; *R. v. Bonner*, 1834; *R. v. Van Butchell*, 1825; *R. v.*

declaration and the death of the declarant, furnishes no rule for the admission or rejection of the testimony; though, in the absence of better evidence, it may serve as one of the exponents of the deceased's belief, that his recovery was or was not impossible. It is the *impression of impending death*,¹ and not the circumstance that death in point of fact followed very soon after the declaration was made, which renders the testimony admissible. If, therefore, it appear that the deceased, at the time of the declaration, had *any* expectation or hope of recovery, however slight it may have been, and though death actually ensued within an hour afterwards, the declaration will be inadmissible.² On the other hand, a firm belief that death is *impending*,³—by which is meant, not, as once thought,⁴ a belief that it will follow almost immediately, but that it will certainly happen shortly in consequence of the injury sustained,⁵—suffices to render the statement evidence, though the sufferer may *subsequently* express a hope of recovery,⁶ or may chance to linger on for some days, or even for two or three weeks.⁷

§ 719. In Scotland it is immaterial, except as regards the *weight* of the evidence, whether or not the declaration be made under the impression of impending death; but where a party has received a mortal wound, an account of the matter given by him at any time

Mosley, 1829; R. v. Spilsbury, 1835 (Coleridge, J.); R. v. Minton, 1800; R. v. Scallan, 1838 (Ir.). See R. v. Nicolas, 1852; R. v. Qualter, 1854; R. v. Perkins, 1840.

¹ R. v. Forester, 1866 (Byles, J.), where the law seems to have been laid down somewhat too strictly.

² R. v. Welborn, 1792; R. v. Christie, 1821; R. v. Jenkins, 1869; R. v. Mackay, 1868; R. v. Hayward, 1833; R. v. Crockett, 1831; R. v. Fagent, 1835; R. v. Megson, 1840. Dying declarations by persons who said, "I have no hope of recovering, unless it be the will of God" (R. v. Murphy, 1841 (Richards, B.) (Ir.)); "I think myself in great danger" (R. v. Errington, 1838); or by a person previously told by a doctor that there was "*little or no* hope of recovery" (R. v. Mitchell, 1892), have been respectively rejected. See R. v. Howell, 1845.

³ R. v. Goddard, 1882 (Hawkins, J., and Baggallay, L.J.).

⁴ Hullock, B., in R. v. Van Butchell, 1829. See, also, R. v. Forester, 1866 (Byles, J.); R. v. Osman, 1881 (Lush, L.J.).

⁵ R. v. Reaney, 1857.

⁶ R. v. Hubbard, 1881 (Hawkins, J.).

⁷ In R. v. Woodcock, 1789, the declarations were made two days before death; in R. v. Bonner, 1834, three days; in R. v. Whitworth, 1858, six days; in R. v. Tinckler, 1781, ten days; in R. v. Reaney, 1857; in R. v. Mosley, 1825, eleven days; and in R. v. Bernadotti, 1869 (Brett & Lush, JJ.), nearly three weeks; yet they were all received. In R. v. Mosley, 1825, and in R. v. Whitworth, 1858, it appeared that the surgeon did not think the case hopeless, and told the patient so: but the patient thought otherwise. See, also, R. v. Peel, 1860; R. v. Howell, 1845.

subsequent to the injury will be admissible in the event of his death, provided it were made seriously and deliberately, and whilst the deceased appeared to be aware of what he was doing, and in the possession of his faculties.¹

§ 720.² The dying declarations of a deceased are admissible *only as to matters to which he would have been competent to testify*, if sworn in the cause. Therefore they must in general narrate facts only, and not mere opinions;³ and they must be confined to what is relevant to the issue. But it is not necessary that the examination of the deceased should have been conducted after the manner of interrogating a witness in the cause, though any departure from this mode may affect the credibility of the declarations. Therefore, in general, it is no objection to their *admissibility*, that they were made in answer to leading questions,⁴ or obtained by earnest solicitation.⁵ But where a statement, ready written, was brought by the father of the deceased to a magistrate, who accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was, in Ireland, rejected, the judge observing that, “in the state of languor in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true;” and adding, “the magistrate should not have trusted to the relation of a third person, but should have taken down the deceased’s declaration from her own lips, or at least have had it taken down in his presence.”⁶ Dying declarations by the victim of a homicide are, if properly made, equally admissible in favour of an accused as well as of the prosecutor.⁷

§ 721.⁸ Whatever the declaration may be, it must be *complete* in itself; for, if the dying man appears to have intended to qualify it

¹ Alison, *Prac. Cr. L.* (Sc.) 510—512, 604—607; 2 Hume, *Com.* 391—393; 1 Dickson, *Ev.* 66, 67. The same law seems to have prevailed in England a century ago. See *R. v. Blandy*, 1752.

² *Gr. Ev.* § 159, in part.

³ *R. v. Sellers*, 1796.

⁴ *R. v. Smith*, 1865.

⁵ *R. v. Fagent*, 1835; *R. v. Reason*, 1734; *Com. v. Vass*, 1831 (Am.); *R. v. Whitworth*, 1858.

⁶ *R. v. Fitzgerald*, 1841 (Ir.) (Crampton, J.).

⁷ *R. v. Scaife*, 1836. The same law prevails in Scotland, 2 Hume, *Com.* (Sc.) 393; cp. *R. v. Gray*, ante, § 775.

Gr. Ev. §§ 159 and 161, in part.

by other statements, which he is prevented by any cause from making, it will not be received.¹ Again, if the statement were *committed to writing* at the time it was made, this writing must be produced, or its non-production accounted for; and neither a copy, nor parol evidence of the declaration, can be admitted in the first instance to supply the omission.² But where three declarations had been made at different times on the same day, one of which was made under oath to a magistrate, and reduced to writing, but the other two were not, it was held that these last two might be proved by parol, though the written statement was not produced.³ If the deposition of the deceased has been taken under any of the statutes on that subject, and is inadmissible as such, for want of compliance with some of the legal formalities, it seems that it may still be treated as a dying declaration, if made by a declarant who was in extremis.⁴

§ 722.⁵ Though declarations, deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, it should always be recollected that the accused has not the *power of cross-examination*,—a power often as effectual in eliciting of the truth as the obligation of an oath;—and that where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction. Moreover, the particulars of the violence to which the deceased has spoken are likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.⁶

¹ 3 Leigh, R. 797.

² *R. v. Gay*, 1835 (Coleridge, J.); *R. v. Reason*, 1734. But see ante, § 415.

³ *R. v. Reason*, 1734, Platt, C.J., dubit. See *R. v. Scallan*, 1838 (Ir.).

⁴ *R. v. Woodcock*, 1789; *R. v. Callaghan*, 1793.

⁵ Gr. Ev. § 162, in great part.

⁶ *Jackson v. Kniffen*, 1806 (Livingston, J.) (Am.); *R. v. Ashton*, 1837 (Alderson, B.). See, also, Mr. Evans's observations on the great caution to be observed in the use of this kind of evidence, in 2 Poth. Obl. 255 (293); 2 St. Ev. 367; and 1 Ph. Ev. 292.

AMERICAN NOTES.

Dying Declarations. — An exception to the rule rejecting hearsay is that which on indictments for homicide admits statements by the deceased as to the circumstances attending the fatal injury, provided that the presiding justice is satisfied that such statements were made under a sense of immediately approaching death. "Dying declarations are made *in extremis*, when the party is at the point of death, when every hope of this world is gone, when every incentive to falsehood is silenced, and the mind is induced by the most powerful considerations, to speak the truth; and is considered, in law, as creating an obligation as great as that created by an oath; and in prosecutions for murder, it is the common practice to admit as evidence, the dying declaration of the person, with whose murder the prisoner stands charged." *Hudson v. State*, 3 Cold. 355 (1866); *State v. Pool*, 20 Ore. 150 (1890); *State v. Umble*, 115 Mo. 452 (1893); *Crump v. Com.* (Ky.) 20 S. W. 390 (1892); *People v. Hawes*, 98 Cal. 648 (1893).

"When dissolution is approaching, and the dying man has lost all hope of life, and the shadows of the grave are gathering in around him, and his mind is impressed with the full sense of his condition, the solemnity of the scene and hour gives to his statements a sanctity of truth, more impressive and potential than the formalities of an oath — and such declarations ought to be received and considered by the jury, under the charge of the Court, as to their effect and weight, in all cases where the evidence of fact warrant their admissibility." *Hill v. State of Georgia*, 41 Ga. 484, 503 (1871); *State v. Pearce*, 56 Minn. 226 (1894).

A RESTRICTED RULE. — The limitations of the rule, as stated in the first paragraph of this note, are rigidly maintained. The rule cannot be said to be one whose extension is judicially favored. In a deeply religious Christian community, thoroughly impressed with the certainty of a future existence of rewards and punishments, it is possible to believe that in the supreme moments of approaching dissolution, every other consideration and motive except that of a desire to tell the exact truth fades into the mental background, and the solemnity of death is equivalent to that of an oath. Under changed conditions, and, possibly, changed religious views, the force of this reasoning has been much shaken. The absence of cross-examination and the stringent consequences to the prisoner of admitting such evidence are compensated for to a very limited extent. Indeed, it is probable that at the present time it is mainly the supposed necessity of the situation which admits dying declarations rather than any equivalence between the sanction of consciously approaching death and that of an oath.

"There would be the most lamentable failure of justice, in many cases, were the dying declarations of the victims of crime excluded from the jury." *People v. Glenn*, 10 Cal. 32 (1858); *Morgan v. State*, 31 Ind. 193 (1869).

The tendency to restrict the scope of this kind of evidence is marked. "The exception is in derogation of common right, for, independent of constitutions and laws, an accused person has the right to have the witness, who is to condemn him, in his presence, so that he may be subjected to the most rigid inquisition. To hang a man on the statements of one who is on his dying bed, racked with pain, incapable, in most cases, of giving a full and accurate account of the transaction, weakened in body and in mind, and though *in articulo mortis*, harboring some vindictive feeling against him who has brought him to that condition, is, to say the least, and has always been, a dangerous innovation upon settled principles of evidence, and no court ought to be disposed to extend it to embrace cases to which it did not, in its inception, apply." *Marshall v. G. E. R. R. Co.* 48 Ill. 475 (1868). "For the reason that the admission of such statements is exceptional, they ought always to be excluded unless they come within the rule in every respect." *State v. Belcher*, 13 S. C. 459 (1880).

Of a ruling that dying "statements are worthy of more credence, under such circumstances, than if made under the sanction of an oath, duly administered according to law," the supreme court of Texas say: "We think the charges here cited are clearly erroneous, because they raise hearsay evidence to the highest testimony known. This is in conflict with the clearly enunciated rule laid down by every writer on evidence to which we have had access, and contrary to the reason for the admission of proof to establish any fact. Dying declarations are admitted as evidence under an exception to the general rule, which is founded upon public necessity, and not because they are more worthy of credence than other testimony. They are admitted under restrictions, and when so admitted, they are raised to the character of other evidence, which may, or may not, have great weight, according to the circumstances under which they were made; and it is for the jury, and not the court, to judge of those circumstances, and the credence to be given to those declarations." *Walker v. State*, 37 Tex. 366, 386 (1872). An instruction that a dying declaration of deceased was as much entitled to credit as the evidence of a witness under oath was held properly refused in *Campbell v. State*, 38 Ark. 498 (1882).

"As there can be no cross-examination of the declarant, as the accused can rarely meet his accuser face to face, and as there must of necessity exist great danger of abuse, it should clearly appear that the statements offered in evidence have been made under a

full realization that the solemn hour of death has come, and the court should be satisfied that the declaration was made under an impression of almost immediate dissolution." *State v. Simon*, 50 Mo. 370 (1872); *Morgan v. State*, 31 Ind. 193 (1869); *Lewis v. State*, 9 Sm. & M. 115 (1847).

"It may be affirmed that no well-considered case has varied from these rules, and that the tendency is to greater stringency, rather than to any relaxation in applying them to cases." *State v. Medicott*, 9 Kans. 257, 283 (1872).

The modern feeling of restriction has followed on an early effort to make dying declarations admissible in cases other than those of homicide. Thus, in South Carolina, in a civil action on the case for seducing the plaintiff's daughter, her dying declarations that the defendant was the father of her unborn child were held competent. *McFarland v. Shaw*, 2 Carolina Law Repository, 102 (1815). This precise point was, however, decided the other way by the supreme court of Georgia. *Wooten v. Wilkins*, 39 Ga. 223 (1869), the court remarking as to *McFarland v. Shaw*, "It is directly contrary to the whole current of authority."

And the rule is now well settled that dying declarations are not admissible in civil cases. *Wilson v. Boerem*, 15 Johns. 286 (1818). So the dying statements of one killed by a railway accident are not competent in an action for damages. *Marshall v. Chicago &c. R. R.*, 48 Ill. 475 (1868); *Waldele v. New York Central &c. R. R.*, 19 Hun, 69 (1879); *East Tennessee &c. R. R. v. Maloy*, 77 Ga. 237 (1886); *Daily v. New York &c. R. R.*, 32 Conn. 356 (1865).

The rule is confined strictly to indictments for homicide. On a statutory criminal action for an abortion, dying declarations are incompetent, though death result from the illegal act. "Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations." *People v. Davis*, 56 N. Y. 95 (1874); *State v. Harper*, 35 Oh. St. 78 (1878); *Railing v. Com.* 110 Pa. St. 100 (1885).

Such declarations may be made competent by statute. *Com. v. Thompson*, 159 Mass. 56 (1893).

SCOPE OF DECLARATION LIMITED. — A dying declaration, moreover, must be confined to the circumstances immediately attending the fatal injury.

It is not necessary that the declaration should directly charge the defendant with being the assailant. *State v. Cronin*, 64 Conn. 293 (1894).

The previous bad state of feeling between the prisoner and the deceased is not such a fact as can be proved by a dying declaration. *Ben v. State*, 37 Ala. 103 (1861). Or that deceased was unarmed.

State *v.* Eddon, 8 Wash. 292 (1894). Or that defendant had threatened to shoot the injured person through a window, though the death shot was delivered in this way. Bennis *v.* State, 46 Ind. 311 (1874). Or that deceased prayed God to forgive defendant. Sullivan *v.* State, 102 Ala. 135 (1893).

In other words the dying declaration relates to the *res gestæ* of the particular case under consideration. Where the fatal affray extended over a considerable period of time, this is a decisive test as to the admissibility of the declarations. Wilkerson *v.* State, 91 Ga. 729 (1893); Sullivan *v.* State, 102 Ala. 135 (1893); Clark *v.* State (Ala.), 17 So. 37 (1895); State *v.* Shelton, 2 Jones (N. C.) L. 360 (1855); Leiber *v.* Com. 9 Bush, 11 (1872); State *v.* Jones (Ia.) 56 N. W. 427 (1893); Hackett *v.* People, 54 Barb. 370 (1866); State *v.* Patterson, 45 Vt. 308 (1873); Archibald *v.* State, 122 Ind. 122 (1889). "To render these declarations admissible, it was only necessary that the trial judge should be satisfied, 1st. That the death of deceased was imminent at the time the declarations were made. 2nd. That the deceased was so fully aware of this as to be without hope of recovery. 3rd. That the subject of the charge was the death of the declarant and the circumstances of the death was the subject of the declarations." State *v.* Banister, 35 So. C. 290 (1891); Blackburn *v.* State, 98 Ala. 63 (1892).

A short temporary interruption of a fatal assault does not prevent the previous facts being admissible in a dying declaration. U. S. *v.* Heath, 20 D. C. 272 (1891).

Where a portion of a written declaration *in extremis* does not relate to the *res gestæ* of the particular transaction, the remaining portion of the declaration may be submitted to the jury. Temple *v.* State, 15 Tex. App. 304 (1883).

It is not essential that the dying declaration should be adverse to the accused. It is equally competent, other conditions being present, if in his favor. Hurd *v.* People, 25 Mich. 405 (1872); Moore *v.* State, 12 Ala. 764 (1848); State *v.* Saunders, 14 Ore. 300 (1886); Mattox *v.* U. S., 146 U. S. 140 (1892); Com. *v.* Matthews, 89 Ky. 287 (1889); Brock *v.* Com., 92 Ky. 183 (1891).

But it is necessary that the declaration should be by the person for whose homicide the indictment is found. The dying declaration of one of two alleged murderers, killed while resisting arrest, that he alone committed the crime, is not competent. Mora *v.* People, 19 Colo. 255 (1893).

WHO MAY DECLARE. — The general rule is that the only person whose dying declaration is admissible is the person for whose homicide the indictment has been found.

Consequently it is not competent for the accused to prove his own statements relative to the homicide, although made immediately thereafter, and while he supposed himself to be mortally wounded. Brabston *v.* State, 68 Miss. 208 (1890).

Neither is "the unsworn confession by another, that he had committed the crime, competent evidence for the accused," though made under a sense of impending death. *West v. State*, 76 Ala. 98 (1884).

The dying declarations of a person wounded at the same time with the person for whose homicide the indictment is found are not competent. *Radford v. State* (Tex.) 27 S. W. 143 (1894).

FORM OF DECLARATION. — The form of a dying declaration is immaterial. It may be in writing, reduced to that form by a witness and read to and assented to by deceased and signed by him. *State v. Kindle*, 47 Oh. St. 358 (1890); *Drake v. State*, 25 Tex. App. 293 (1888).

Or may have been reduced to writing at the dictation of deceased and signed by him. *King v. State*, 91 Tenn. 617 (1892). Or reduced to writing by a third person in response to questions asked deceased by a witness and signed by the deceased with his mark. *Com. v. Haney*, 127 Mass. 455 (1879).

If the dying declaration be in writing, the "best evidence" rule applies to the document. The original must be produced or its absence satisfactorily accounted for, in order to permit secondary evidence to be given of the contents. *People v. Glenn*, 10 Cal. 32 (1858); *State v. Tweedy*, 11 Ia. 350 (1860); *Drake v. State*, 25 Tex. App. 293 (1888); *Collier v. State*, 20 Ark. 36 (1859); *Krebs v. State*, 8 Tex. App. 1 (1880); *Turner v. State*, 89 Tenn. 547 (1890); *Boulden v. State* (Ala.) 15 So. 341 (1894).

"But where the accused, for any reason, procures the rejection of the writing, as he did in this case, it does not lie in his mouth to object to oral testimony detailing what the deceased then said, provided it be shown that the statement was made under the conditions necessary to render a statement admissible as a dying declaration." *Hines v. Com.* 90 Ky. 64 (1890). That there is a written declaration does not prevent the reception in evidence "of independent oral evidence of the same or similar dying declarations of deceased." *People v. Vernon*, 35 Cal. 49 (1868). A written declaration may be used as a memorandum to refresh the memory of the witness. *State v. Whitson*, 1 N. C. 695 (1892); *Com. v. Haney*, 127 Mass. 455 (1879). But the memorandum is not itself admissible. *Beets v. State*, Meigs, 106 (1838). Where the witness took memoranda in writing and has lost them, the fact affects not the admissibility but the credibility of his evidence. *State v. Patterson*, 45 Vt. 308 (1873).

Where the dying declarations were taken down in writing by a witness but not read to, signed or assented to by the deceased, the supreme court of Iowa held that the absence of the original need not be accounted for. Speaking of the opposite contention, the court say: "This would have been correct if the writing had been

signed by deceased, or, probably, read to and pronounced by him correct." *State v. Sullivan*, 51 Ia. 142 (1879).

It is not a valid objection to a dying declaration that it is made in response to questions. *Hunnicut v. State*, 18 Tex. App. 498 (1885); *Anderson v. State*, 79 Ala. 5 (1885); *R. v. Sparham*, 25 C. P. U. C. 143 (1875); *Boyle v. State*, 97 Ind. 322 (1884); *Vass v. Com.*, 3 Leigh, 786 (1831); *State v. Foot You*, 24 Ore. 61 (1893).

Even though the questions are leading. *R. v. Smith*, 23 C. P. U. C. 312 (1873). Or was made under oath. *State v. Talbert*, 41 S. C. 526 (1894).

If the declaration is complete in itself, it is no objection that the deceased is unable, by reason of weakness, to answer a subsequent question. *McLean v. State*, 16 Ala. 672 (1849). Or did not state the entire transaction. *State v. Patterson*, 45 Vt. 308 (1873); *State v. Nettlebush*, 20 Ia. 257 (1866).

That the deceased was obliged to express his meaning by signs is without importance on the question of admissibility. *Jones v. State*, 71 Ind. 66, 75 (1880); *Baxter v. State*, 15 Lea, 657 (1885); *Com. v. Casey*, 11 Cush. 417, 421 (1853). "The principal objection relates to the admission in evidence of certain dying declarations of the deceased. There was a written declaration and verbal declarations made at different times. They were all admissible. 'The prosecutor in a murder case cannot be confined to proving dying declarations made at one time, if there were others made at other times. All are competent. Nor can he be confined to proving what was said at one time, when the statement was reduced to writing and signed at another.' 6 Am. & Eng. Enc. Law, 131; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662." *State v. Walton*, 61 N. W. (Ia.) 179 (1894).

CONFINED TO DEATH OF DECLARANT. — The prevailing rule is to the effect that the declaration must relate to the death of the declarant and even where others are killed at substantially the same time the scope of the declarations cannot be extended so far as to cover any injury except to him for whose death the indictment is brought.

A wider scope has been given in certain states.

Thus where several were claimed by the prosecution to have been poisoned by the prisoner, one Terrell, by strychnia, disguised in liquor, at about the same time, evidence is competent that one of the victims, in view of approaching death, said, "There was something strange about the way Mr. Terrell had acted;" "he Terrell had never left him in the store before and told him to invite persons in to drink liquor;" "he was poisoned for the first time in his life," etc. *State v. Terrell*, 12 Rich. (S. C.) Law, 321 (1859).

So where the declarant "was wounded mortally by the same

shot, or at least at the same time that A. (for whose murder the prisoner is on trial) was killed. *State v. Wilson*, 23 La. Ann. 558 (1871).

The rule has, however, been held to be otherwise in a majority of states. Thus in an Iowa case where several persons had been killed at about the same time in a general fight with revolvers between two families in an attempt to settle a family feud, the dying declarations of one son that the defendant killed him is not admissible on an indictment for the murder of his brother, though the wounds were apparently made by the same instrument. "As to this case they were clearly hearsay declarations, relating to a crime for which defendant was not on trial. This illegal testimony could not have been otherwise than prejudicial to the defendant. Its admission was erroneous." *State v. Westfall*, 49 Ia. 328 (1878).

So where husband and wife were apparently killed in the same attempt at robbery of their house, the dying declarations of the wife are not competent on an indictment for the murder of the husband. *Brown v. Com.* 73 Pa. St. 321 (1873). "We do not think such declarations can be received, except as coming from the deceased person for whose murder the prisoners are indicted." *State v. Fitzhugh*, 2 Ore. 227 (1867); *Hudson v. State*, 3 Cold. 355 (1866).

"The decided weight of authority on the subject seems to be to the effect that it is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration.

The admission of dying declarations as evidence being in derogation of the general rule which subjects the testimony of witnesses as ordinarily received to the two important 'tests of truth,' an oath and a cross-examination, it is obvious that such evidence should be admitted only upon grounds of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it and forming a part of the *res gestæ*." *Leiber v. Com.*, 9 Bush, 11 (1872).

The cases which admit the dying declarations of a person killed at about the same time as the person for whose homicide an indictment is brought, may perhaps be most satisfactorily explained as part of the *res gestæ*. The reasoning of the court, however, frequently relies on the rule under consideration. Thus in the case of *State v. Wagner*, where several persons were murdered on "Smutty Nose" Island, on an indictment for the murder of one, the outcries of a prior victim were held competent. "The doctrine which we hold is this: The outcries of a person deceased during

the perpetration of the assault which results in death, or upon the approach of the assailant, are competent evidence upon the trial of a party charged with the murder of such person, and may be considered by the jury with other circumstances and testimony upon the question of the identity of the accused. The outcries of another person who was murdered by the same party a few minutes previously during the perpetration of one and the same burglary, but on another part of the premises, are admissible under like circumstances for the same purpose upon such trial.

Such outcries certainly partake much of the nature of *res gestæ*, more distinctly so than the statement in *Com. v. McPike*, *ubi supra*, which accompanied the sending for a physician; but we think that the precise ground upon which their admission should be placed in a case like this, is substantially the same as that upon which dying declarations are declared admissible.

Speaking of dying declarations, Roscoe says (*Crim. Ev.* p. 30): 'Evidence of this kind which is peculiar to the case of homicide has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye witness to the fact, and the usual witness in other felonies, viz., the party injured himself is got rid of; but it is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted is that it is of declarations made in extremity, when the party is at the point of death, . . . when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court.' Roscoe adds: 'Probably it is the concurrence of both these reasons which led to the admission of this species of evidence.'

Both these conditions exist in the case at bar. There is as truly a necessity to corroborate the testimony of a surviving witness, whose testimony to the identity of the murderer and the accused may be attacked on the ground that in the darkness and excitement she was liable to mistake, as there is to furnish evidence when no person who witnessed the assault remains alive. Moreover, it is the danger that no surviving witness can be found, which operates to establish the rule, which is of general application, and the fact that in the particular case one did survive would not abrogate it.

And as to the second condition, no one can doubt that the exclamations of these two women embodied the truth as it appeared to each, and that the cries of alarm or supplication uttered by any and all human beings under similar circumstances, would express their perceptions of existing facts as truly as if backed by the sanction of all the oaths known in christendom. To reject the

evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with uplifted weapon, when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections darkened and dimmed by the mists and shadows of approaching dissolution, would be, we think, but a bad sample of 'the perfection of human reason.' It is not to such exclamations that any of the substantial objections to hearsay testimony can be held to apply. Those outcries were as plainly circumstances proper for the consideration of the jury in the attempt to ascertain whether the prisoner was guilty of that crime, as any other portion of the circumstantial evidence in the case." *State v. Wagner*, 61 Me. 178, 194 (1873).

EXPECTATION OF DEATH. — The fact that the declarant at the time of his statement expected to die may be proved by parol and need not appear in the declaration itself. *State v. Wilson*, 23 La. Ann. 558 (1871); *R. v. Smith*, 23 C. P. U. C. 312 (1873); *People v. Sanchez*, 24 Cal. 17 (1864); *Kilpatrick v. Com.* 31 Pa. St. 198, 215 (1858); *Hill v. Com.* 2 Gratt. 594 (1845); *Com. v. Silcox*, 161 Pa. St. 484 (1894); *Wills v. State*, 74 Ala. 21 (1883); *State v. Fletcher*, 24 Ore. 295 (1893); *Dixon v. State*, 13 Fla. 636 (1869); *Hammil v. State*, 90 Ala. 577 (1890); *Morgan v. State*, 31 Ind. 193 (1869); *Dunn v. State*, 2 Ark. 229 (1839); *State v. Russell*, 13 Mont. 164 (1893). This is true even where the declaration is in writing. *Com. v. Haney*, 127 Mass. 455 (1879). Such a belief must, however, be made to appear in an affirmative manner. *People v. Sanchez*, 24 Cal. 17 (1864); *Kilpatrick v. Com.* 31 Pa. St. 198, 215 (1858). "It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved, by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." *Montgomery v. State*, 11 Oh. 424 (1842); *Graves v. People*, 18 Col. 170 (1893); *State v. Nocton*, 121 Mo. 537 (1894).

The court, in deciding whether a declaration was made under a sense of impending death may consider "the evident danger and all the surrounding circumstances." *Com. v. Matthews*, 89 Ky. 287 (1889); *McHargue v. Com.*, (Ky.) 23 S. W. 349 (1893); *Campbell v. State*, 11 Ga. 353 (1852); *Bayse v. State*, 45 Neb. 261 (1895); *McLean v. State*, 16 Ala. 672 (1849); *Miller v. State*, 27 Tex. App. 63 (1889); *Sullivan v. Com.* 93 Pa. St. 284, 296 (1880). "The injured party need not, in express words, declare that he knows he is about to die, or make use of equivalent language." *Com. v. Matthews*, 89 Ky. 287 (1889).

The declarations are still admissible though the declarant subsequently entertains hopes of recovery. *State v. Reed*, 53 Kans. 767 (1894).

It is not required that such declarations should be made *in articulo mortis*. *State v. Johnson*, 102 Ala. 1 (1893).

In *Dumas v. State*, 62 Ga. 58 (1878) the supreme court of Georgia sustain a charge to the jury that "the fact of consciousness of his condition may be shown by circumstances or by expressions made by deceased himself. You can take one or the other, or both together, and determine whether he was *in extremis* at the time the alleged declarations were made."

As bearing on the question of the deceased's expectation of death, the fact that she had received the extreme rights of her (Roman Catholic) Church is competent. *State v. Swift*, 57 Conn. 496 (1889); *State v. O'Brien*, 81 Ia. 88 (1890). But the mere facts that declarant was praying and in suffering are not sufficient. *Cole v. State*, (Ala.) 16 So. 762 (1894).

While the consciousness of impending death may be proved by evidence *aliunde*, there is no doubt that the natural evidence that the deceased knew of his approaching death, like proof of any other mental state, lies in his declaration to that effect. *State v. Fitzhugh*, 2 Ore. 227 (1867); *Hunnicut v. State*, 18 Tex. App. 498 (1885); *Anderson v. State*, 79 Ala. 5 (1885); *R. v. Sparham*, 25 C. P. U. C. 143 (1875); *State v. Blackburn*, 80 N. C. 474 (1879); *State v. Elliott*, 45 Ia. 486 (1877); *Com. v. Thompson*, 159 Mass. 56 (1893). Such a declaration is not conclusive. *Bell v. State*, 72 Miss. 507 (1895).

Declarations made either before or after the dying declaration are admissible on the question of knowledge of impending dissolution. *State v. Vaughan* (Nev.) 39 Pac. 733 (1895).

If the declarant "had any expectation or hope of recovery, however slight it might have been, and though death ensued within an hour afterwards, the declarations are inadmissible." *Com. v. Roberts*, 108 Mass. 296 (1871) citing *State v. Center*, 35 Vt. 378 (1862); *People v. Knickerbocker*, 1 Parker C. C. 302 (1851); *Starkey v. People*, 17 Ill. 17 (1855); *Smith v. State*, 9 Humph. 9 (1848); *Brown v. State*, 32 Miss. 433 (1856); *Moore v. State*, 12 Ala. 764 (1848). A written statement made while there is hope of recovery becomes competent if affirmed after consciousness of impending death. *Mockabee v. Com.*, 78 Ky. 380 (1880); *Million v. Com.*, (Ky.) 25 S. W. 1059 (1894); *People v. Crews*, 102 Cal. 174 (1894).

It is not apparently necessary that the deceased should feel a sense of immediately approaching death. It is sufficient if he feels confident that he has received a fatal injury. *Evans v. State*, 58 Ark. 47 (1893). "Neither would it be sufficient that the declarant

despaired of ultimate recovery, because that is consistent with the hope of indefinite continuance of life. But exactly how immediate must be the expectation of death, the authorities do not seem agreed or clear. Some would seem to confine the rule of admissibility to those made at the very point of death.

The weight of authority, however, does not seem to require so strict a rule, but to justify the admissions if the declarant does not expect to survive the injury from which he actually dies, and the injury is such that it must be expected to result speedily in death." *U. S. v. Schneider*, 21 D. C. 381, 403 (1893); *People v. Chase*, 79 Hun, 296 (1894).

Where the deceased was informed that her only hope of recovery was through an operation, and nothing appeared to control this fact, the declaration was held inadmissible. *Peak v. State*, 50 N. J. L. 179, 221 (1888).

The fact that deceased desired the services of a physician is immaterial. *McQueen v. State* (Ala.) 15 So. 824 (1894); *State v. Evans*, 124 Mo. 397 (1894).

But the expectation of death may exist notwithstanding that a physician extends hope of recovery. *People v. Grunzig*, 1 Parker C. Rep. 299 (1851); *State v. Caldwell*, 115 N. C. 794 (1894). Fear of death is not sufficient. Certainty is required. *Brakefield v. State*, 1 Sneed, 215 (1853). It is not enough that deceased was actually in a dying condition and nodded his head when so informed. *People v. Perry*, 8 Abb. Prac. N. S. 27, 34 (1870). Or that he was in great pain, sent for a physician, and said he could not stand it much longer unless relieved. *Justice v. State*, 99 Ala. 180 (1892).

The definition is thus given by the supreme court of Illinois. "Dying declarations are such as are made, relating to the facts of an injury of which the party afterwards dies, under the fixed belief and moral conviction that immediate death is inevitable, without opportunity for repentance, and without hope of escaping the impending danger." *Simons v. People*, 150 Ill. 66, 73 (1894).

Using the phrase "If I die" is not necessarily fatal to the declaration if it appears upon all the statements of deceased that the certainty of death was recognized. *R. v. Sparham*, 25 C. P. U. C. 143 (1875).

In a Missouri case, however, where the same expression, "If I die," was employed, the court held that, in the absence of explanation, the uncertainty was fatal to the reception of the evidence, and proceed to make the following excellent suggestions. "Any person who has been accustomed to attend on those who are injured, or are very ill, knows how common it is for them to say that they will never recover, or that they will die, when there is no good or sufficient reason for the apprehension, and they are not conscious themselves that they are in any real danger. Such expressions

are often the result of impatience, restlessness, or great suffering. But at the same time let the attending physician inform them that there is no hope, and that they must die, and they will be perfectly startled." *State v. Simon*, 50 Mo. 370 (1872). To the same effect is *State v. Medlicott*, 9 Kans. 257, 282 (1872). Such vague phrases as "I will die of it," "It is all over with me," "I will never recover," are insufficient. *R. v. Peltier*, 4 L. Can. Rep. 3 (1853).

"The admissibility of such declarations does not depend upon any particular forms of expression, for these will vary indefinitely; but it depends upon the view which the deceased took of his own case when in imminent danger of death." *Com. v. Roberts*, 108 Mass. 296 (1871).

But see *State v. Center*, 35 Vt. 378 (1862). In *People v. Hodgdon*, 55 Cal. 72 (1880), where the phrase was "Believing that I am very near death, and realizing that I may not recover," the fact that all hope was not abandoned was held fatal.

It follows from what has been said that it is not sufficient that these declarations are, in fact, made *in extremis*. "They are only admissible where the party making them knows or thinks that he is in a dying state. . . . It is this *consciousness*, coupled with the condition of the party, which supplies the place of an oath, and peculiarly distinguishes dying declarations from hearsay." *Dixon v. State*, 13 Fla. 636 (1869), citing with approval *Montgomery's Case*, 11 Ohio, 424 (1842).

"It is the impression of almost immediate dissolution and not the rapid succession of death in point of fact that renders the testimony admissible. *Vaughan v. Com.*, 86 Ky. 431 (1887); *Starr v. Com.*, (Ky.) 30 S. W. 397 (1895).

On the other hand, the fact that death fails to ensue, as anticipated by deceased, for a period of seventeen days is immaterial. *State v. Daniel*, 31 La. Ann. 91 (1879); *Com. v. Cooper*, 5 All. 495 (1862). "Our judgment concurs with that of the English court of criminal appeal, as expressed by chief Baron Pollock, in the latter of those cases. *R. v. Reaney*, 7 Cox C. C. 209. 'In order,' he says, 'to render such a declaration admissible, it is necessary that it should be made under the apprehension of death. The books certainly speak of near approaching death; but there is no case in which any particular interval, any number of hours or days, is specified as the limit. In truth, the question does not depend upon the length of interval between the death and declaration, but on the state of the man's mind at the time of making the declaration, and his belief that he is in a dying state.'" *Com. v. Cooper*, 5 All. 495 (1862). The case is cited with approval in *Com. v. Roberts*, 108 Mass. 296 (1871), where the interval was the same.

If the other conditions are present, a dying declaration is none

the less admissible if death does not ensue for twenty-five days. *State v. Oliver*, 2 Houston (Del.) 585 (1863). So of fourteen days. *Jones v. State*, 71 Ind. 66 (1880). Or sixteen. *Baxter v. State*, 15 Lea (Tenn.) 657 (1885). So an interval of six days. *State v. Center*, 35 Vt. 378 (1862). Twelve days. *People v. Grunzig*, 1 Parker C. C. 299 (1851). Forty days. *State v. Wilson* (Mo.) 26 S. W. 357 (1894). Or even two months. *Boulden v. State* (Ala.) 15 So. 341 (1894).

IMPEACHMENT. — It hardly need be said that the accuracy and veracity of the dying declarant may be impeached; e. g., where the declaration was as to the identity of the accused, by evidence that the deceased was in the habit of mistaking her friends for persons whom they did not resemble. "A defendant against whom dying declarations are received has not the opportunity of cross-examining the declarant. Hence it is justly held that he is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a more full investigation by means of cross-examination." *Com. v. Cooper*, 5 All. 495 (1862).

So the "peculiar character of the deceased for wickedness and disregard of the law of God in his outpourings of blasphemy," is competent evidence for the jury. "For if a man, even without hope of life in this world, nevertheless without belief in God or in the divine revelation, while his declarations would be admissible, their weight and consideration should be weighed by the jury." *Nesbit v. State*, 43 Ga. 238 (1871). So it may be shown, to discredit the dying declaration, "that the deceased was a disbeliever in a future state of rewards and punishments." *Goodall v. State*, 1 Ore. 333 (1861).

The lack of belief in a future state, though usually not a ground for rejecting the evidence, may still be received at least to detract from the value of a dying declaration. *Hill v. State*, 64 Miss. 431 (1886); *State v. Elliott*, 45 Ia. 486 (1877).

Or the declarant may be impeached by proof of his inconsistent statements whether made *in extremis* or not. "The only case holding otherwise is that of *Wroe v. State*, 20 Oh. St. 460 (1870). This case has never been followed, so far as we have been able to discover, and its reasoning is narrow and unsatisfactory. . . . To deprive the defendant of the only possible method of impeaching the credit or memory of the declarant, by proof of contradictory statements, would be a gross injustice." *Morelock v. State*, 90 Tenn. 528 (1891). "There is no reason why the same principle of law should not be applied to the contradictory statements of persons *in extremis* and those of a person on examination under oath. The court upon this point should have charged the jury, that if they believed that the contradiction in the dying declarations of the deceased, were produced by ignorance on her part as to

who had committed the offence, and a mere surmise that it was the prisoner, they ought to be rejected and not permitted to have any weight in coming to a conclusion upon which their judgment was to be based; but that if they believed that the contradictions were produced by apprehension and fears of her husband, or an unwillingness to charge him with the offence, and not from ignorance as to his guilt, then the contradictions might be reconciled, and that portion of her declaration charging the prisoner with the offence ought to be taken into consideration by them, and such weight ought to be given to it as from all the circumstances in the case they might think it justly entitled." *McPherson v. State*, 9 Yerger, 279 (1836).

The declarant can not only be impeached; he may be sustained by appropriate evidence.

It has been held that where there is evidence tending to destroy the effect of dying declarations, it is competent for the state to corroborate them by showing that deceased made similar declarations a few minutes after the fight, though it did not appear that he was then under the apprehension of immediate death. *State v. Blackburn*, 80 N. C. 474 (1879).

A QUESTION FOR THE COURT. — Whether the circumstances necessary to entitle an alleged dying declaration to be received in evidence actually exist is a preliminary question for the court. "It is the duty of the court to determine, in the first place, upon the admissibility of such declarations, and then it is for the jury to determine upon the weight, or credibility of them." *Moore v. State*, 12 Ala. 764 (1848); *Donnelly v. State*, 26 N. J. L. 463 (1857); *Montgomery v. State*, 11 Ohio, 424 (1842); *State v. Foot You*, 24 Ore. 61 (1893); *Roten v. State*, 31 Fla. 514 (1893); *State v. Center*, 35 Vt. 378 (1862); *Bull v. Com.*, 14 Gratt. 613 (1857); *State v. Simon*, 50 Mo. 370 (1872); *State v. Trivas*, 32 La. Ann. 1086 (1880); *State v. Aldrich*, 50 Kans. 666 (1893); *State v. Johnson*, 118 Mo. 491 (1893); *State v. Nocton*, 121 Mo. 537 (1894).

The court, it has been held, cannot leave the entire question, including admissibility, to the jury. *State v. Center*, 35 Vt. 378 (1862). *Roten v. State*, 31 Fla. 514 (1893).

The decision is however subject, it has been held, to review. *Donnelly v. State*, 26 N. J. Law, 463 (1857).

"The court does not discharge this duty by simply hearing the evidence produced upon the part of the State. Evidence, if offered, should be received upon the part of the defendant, and it should be weighed upon the determination of the question of admissibility. The declarations of a dying man are admitted on a supposition that in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice. Roscoe's

Criminal Evidence, p. 35. Before the judge decides the question of admissibility he hears all the deceased said respecting the danger in which he considered himself, and he should be satisfied that the declaration was made under an impression of almost immediate dissolution." *State v. Elliott*, 45 Ia. 486 (1877); *State v. Johnson*, 118 Mo. 491 (1893).

The preliminary inquiry may, it is said, be held either in the presence and hearing of the jury, or otherwise, as the discretion of the trial judge may dictate. *State v. Shaffer*, 23 Ore. 555 (1893).

In a Georgia case it was held "that the proper course to be pursued was this: that a *prima facie* case of the moral consciousness required, should be exhibited to the Court in the first instance, as preliminary to the admission of the testimony. This done, the evidence should be received and left for the Jury to determine whether the deceased was really under the apprehension of death when the declarations were made, which they might infer either from circumstances or the expressions used." *Campbell v. State of Georgia*, 11 Ga. 353, 376 (1852).

Even if admitted by the court, the weight of the evidence is entirely for the jury. *State v. Elliott*, 45 Ia. 486 (1877). "This preliminary adjudication of the court upon the question as to the admissibility of the testimony, in case the evidence be allowed, has decided nothing in regard to its credibility. That peculiar province still remains for the jury. It is every day's practice to admit evidence as competent, which the jury have no hesitation in disbelieving. The court may decide, upon examination of proofs, that a witness is not incompetent for want of reason or understanding; the jury may, notwithstanding, determine within their province, what is the weight of his testimony, and may graduate the credit they will repose in it, from the point of total disbelief to that of the most implicit confidence." *Vass's Case*, 3 Leigh, 786, 794 (1831); *State v. Cameron*, 2 Chandler (Wis.) 172 (1850); *Campbell v. State*, 38 Ark. 498 (1882); *State v. Foot You*, 24 Ore. 61 (1893); *Brock v. Com.* 92 Ky. 183 (1891); *Jones v. State*, 70 Miss. 401 (1892).

The supreme court of Georgia in *Dumas v. State*, 62 Ga. 58 (1878) sustained the following ruling on this point. "If the court is satisfied *prima facie* that the deceased is in extremis and conscious of his condition, it will allow the dying declarations to go to the jury. The jury will look to the evidence to see if the person making them was in extremis at the time, and was conscious of his condition. If the jury believe the fact that the person was in extremis, and conscious of his condition, then they may consider the dying declarations as evidence." To same effect, *Wallace v. State*, 90 Ga. 117 (1892).

In *Com. v. Roberts*, 108 Mass. 296 (1871) the ruling to the jury

was "that the credibility of the evidence was entirely within the province of the jury, and they were at liberty to weigh all the circumstances under which the declarations were made, including those upon which the court had already passed merely as preliminary to their admission; and that the jury were to determine the state of mind under which the testimony was given, and its weight." This ruling was apparently sustained, *sub silentio*.

Leaving the question in this way to the jury does not, however, make either the ruling of the court on the admission of the evidence or the decision of the jury as to the existence of the facts required by the court, final so as to prevent the ruling being reviewed upon exceptions. "It was a ruling in matter of law; and the life of a defendant may be involved in a ruling on this point. In many of the cases reported, the court have discussed the evidence on which the question turned." *Com. v. Roberts*, 108 Mass. 296 (1871).

The court will exclude the dying declaration where it appears that the declarant had no belief in God or a future state of reward and punishment. *Donnelly v. State*, 26 N. J. Law, 463 (1857).

Such disbelief will not be presumed. It must appear by affirmative evidence. *Ibid*.

Slaves are supposed to have a religious belief. *Lewis v. State*, 9 Sm. & M. 115 (1847).

OPINION EXCLUDED. — The declarant should state facts rather than conclusions. *McBride v. People*, 5 Colo. App. 91 (1894). Where a declarant, however, used the expression, "He shot me down like a dog," the expression was held admissible. "Declarations of a party in extremis, in order to be admissible, must be as to facts and not conclusions. They are permitted as to those things to which the deceased would have been competent to testify, if sworn in the case. But I do not think the expression of the deceased a conclusion. It was given as a part of his narrative relating to the affair, and I think it was merely intended to illustrate the lack of provocation and the wantonness in which the appellant did the act. It was descriptive of the manner in which the act was committed. It conveyed the idea that the appellant disregarded the claims of humanity, and, without giving him any warning, wantonly shot him. It was the statement of a fact made by way of illustration." *State v. Saunders*, 14 Ore. 300 (1886). So of a declaration, "It was done without any provocation on his part." *Wroe v. State*, 20 Oh. St. 460 (1870). Or that deceased was "butchered." *State v. Gile*, 8 Wash. 12 (1894).

"A mere expression of opinion by the dying man is not admissible as a dying declaration, and it is immaterial whether the fact that the declaration is mere opinion appears from the statement itself, or from other undisputed evidence showing that it was

impossible for the declarant to have known the fact stated. If, upon any view of the evidence, it is possible for the declarant to know the truth of what he states, his declarations, being otherwise competent, should be received and considered by the jury in the light of all the evidence." *Jones v. State*, 52 Ark. 345 (1889); *Binns v. State*, 46 Ind. 311 (1874); *State v. Arnold*, 13 Ired. L. 184 (1851); *State v. Parker*, 96 Mo. 382 (1888).

A declaration by a deceased who was shot at night in a house from the outside through an aperture in the logs, made while *in extremis*, "It was E. W. who shot me, though I did not see him" was accordingly rejected. *State v. Williams*, 67 N. C. 12 (1872). But the statement that deceased and accused "were playing, and that it was an accident" is competent. "To be competent as a dying declaration, the statement must not only relate to the immediate circumstances of the transaction resulting in the inquiry, but it must detail facts, and not the opinion of the declarant. In our opinion, the statement in this instance conforms to this rule. It is unlike the case where the injured party declared that he had been killed for nothing. This was purely his opinion and inference. Here the injured man said that he and the accused were engaged in play, and that the shooting was an accident. This, in our opinion, was the statement of a fact, more than the giving of an opinion, and the court properly permitted it to be proven." *Com. v. Matthews*, 89 Ky. 287 (1889).

The use of the phrase "Believing myself to be now on my death bed" does not imply opinion, and such a declaration is admissible. *Doolin v. Com.* 95 Ky. 29 (1893).

"We apprehend there is a decisive test to which 'dying declarations' must be subjected, and by it their admissibility as testimony can be readily determined. That test is, whatever may be stated by a witness under oath, is admissible in evidence as dying declarations, made by one under the consciousness of approaching death. The statement, under such circumstances, is held to be as truthful as if under oath, and equivalent to a statement sworn to. But the opinions of witnesses under oath, as a general rule, are inadmissible in evidence in criminal cases, and hence opinions in dying declarations are excluded." *Whitley v. State*, 38 Ga. 50 (1868).

The statement that the accused had no reason for the felonious assault is not objectionable as being an expression of opinion. *Boyle v. State*, 97 Ind. 322 (1884).

MINOR CONSIDERATIONS. The admission of dying declarations does not infringe the prisoner's right to be confronted with the witnesses against him. *Brown v. Com.*, 73 Pa. St. 321 (1873); *State v. Saunders*, 14 Ore. 300 (1886); *State v. Kindle*, 47 Oh. St. 358 (1890); *People v. Glenn*, 10 Cal. 32 (1858); *Walston v. Com.*, 16 B. Monr. (Ky.) 15 (1855); *Com. v. Carey*, 12 Cush. 246

(1853); *Campbell v. State*, 11 Ga. 353 (1852); *Robbins v. State*, 8 Oh. St. 131 (1858).

"The rule, however, was well settled before the adoption of our constitution, that the declarations of a dying person were admissible in cases of homicide 'where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations;' and we have no idea that it was the object of this provision in the bill of rights to abrogate this rule of evidence." *Miller v. State*, 25 Wis. 384 (1870).

"The Constitution does not alter the rules of evidence, or determine what shall be admissible testimony against the prisoner, but it only secures to him the right to confront the witnesses who may be introduced to prove such matters as, according to the settled principles of law, are evidence against him. This objection, if carried out fully, would result in the rejection of all declarations, even where they constitute part of the *res gestæ*. The law determines the admissibility of testimony — the Constitution secures to the accused the right to meet the witness who deposes face to face. But what the witness, when thus confronted, shall be allowed to state as evidence, the Constitution does not undertake to prescribe, but leaves it to be regulated by the general principles of the law of evidence. When the declarations of the deceased are offered to the jury, they constitute facts in legal contemplation, which tend to establish the truth of the matter to which they relate. The position, therefore, that their admission as evidence infringes upon the constitutional right of the prisoner to confront the witnesses against him, is wholly without foundation, and cannot be maintained." *Walston v. Com.* 16 B. Monr. (Ky.) 15, 35 (1855).

"The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. And it is as to him that the privileges of an oral and cross examination are secured." *Campbell v. State of Georgia*, 11 Ga. 353, 374 (1852).

"This objection is founded in a misconception of fact. The accused is confronted by the witness on his trial. The deceased person is not the witness, but the person who can relate, on the trial, the death-bed declarations, is the witness. The objection, if there be one, is to the competency of the evidence, and not to the want of the personal presence of the witness. And it appears to be well settled, that dying declarations, within the restricted rule prescribed, fall within the exceptions to the general rule that hearsay is not evidence." *Robbins v. State*, 8 Oh. St. 131, 163 (1857).

The supreme court of Iowa, in a case where the point was not fully considered, suggest that if the question were a new one they might feel constrained to decide contrary to the existing rule on this subject, stated *supra*. *State v. Nash*, 7 Ia. 347 (1858).

The dying declarations of a husband are evidence on an indictment against the wife. *Moore v. State*, 12 Ala. 764 (1848); *People v. Green*, 1 Denio, 614 (1845); *State v. Belcher*, 13 S. C. 459 (1880).

If the deceased die before completing his declaration that which remains is incompetent and the conclusion of the declarant that the corrections were "immaterial" does not affect the rule. "If too much has been said, the narrative may be as damaging to the accused as if it was partial. If it needs correcting, the defect — the error to be corrected — may be as injurious as if it were partial and incomplete." *Drake v. State*, 25 Tex. App. 293 (1888).

It is sufficient if the reporting witness is able to state the substance of the dying declarations. Such evidence is admissible "although the witness was unable to give the precise words." *Montgomery v. State*, 11 Ohio, 424 (1842); *Ward v. State*, 8 Black. 101 (1846); *Murphy v. People*, 37 Ill. 447 (1865).

It is not necessary that the reporting witness should be sure of the precise order of the statements. *King v. State*, (Tex.) 29 S. W. 1086 (1895).

The fact that a dying declaration was in a foreign language (Chinese), and introduced in evidence through an interpreter, affects merely the weight of the evidence. *State v. Foot You*, 24 Ore. 61 (1893).

Part of a dying declaration may be received and the rest rejected on a general objection by the defendant. *State v. Wilson*, (Mo.) 26 S. W. 357 (1894).

"The true grounds upon which the declarations are receivable as testimony" are thus stated by the learned Judge Redfield. "It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission; for, if that were all that is requisite to render the declarations evidence, the apprehension of death should have the same effect, since it would place the declarant under the same restraint as if the apprehension were founded in fact. But both must concur, both the fact and the apprehension of being *in extremis*. And although it is not indispensable that there should be no other evidence of the same facts, the rule is no doubt based upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished, is unquestionably the chief ground of this exception in the law of evidence. And the great reason why it could not be received generally, as evidence in all cases where facts involved

should thereafter come in question, seems to be that it wants one of the most important and indispensable elements of testimony, that of an opportunity for cross examination by the party against whom it is offered." 1 Greenlf. Evid. § 156, note.

CHAPTER IX.

ADMISSIONS.

§ 723.¹ *Admissions and confessions* are often considered as declarations against interest, and, therefore, probably true. With regard, however, to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act, believed himself to be speaking or acting against his own interest; but often the contrary. Such evidence seems, therefore, more properly admissible as a *substitute* for the ordinary and legal proof;² either in virtue of the direct consent and waiver of the party, as in the case of explicit and solemn admissions, or on grounds of public policy and convenience, as in the case of those implied from assumed character, acquiescence, or conduct.³ Many admissions,

¹ Largely Gr. Ev. § 169.

² As to when the admissions of a party with respect to written instruments may be substituted for the ordinary proof of such instruments by their production, see ante, §§ 410—414.

³ According to Mascardus, this is the light in which confessions and admissions are regarded by the Roman law. *Illud igitur in primis, ut hinc potissimum exordiar, non est ignorandum, quod etsi confessioni inter probationum species locum in præsentia tribuerimus; cuncti tamen fere Dd. unanimes sunt arbitrati, ipsam potius esse ab onere probandi relevationem, quam proprie probationem.* 1 Masc. de Prob. quæst. 7, n. 1, 10, 11; Menoch. de Præs. lib. 1, quæst. 61, n. 6; Alciat. de Præs. par. 2, n. 4. We further find that Roman law distinguishes, with great clearness and precision, between confessions extra judicium, and confessions in judicio; treating the former as of very little and often of no weight, unless corroborated, and the latter as generally, if not always, conclusive, even to the overthrow of the *presumptio juris et de jure*; thus constituting an exception to the conclusiveness of this class of presumptions. But to give a confession this effect, certain things are essential, which Mascardus cites out of Tancred:—

“Major, spontè, sciens, contra se, ubi jus fit;
Nec natura, favor, lis, jusve repugnet, et hostis.”

Masc. ub. sup. n. 15; Vid. Dig. lib. 42, tit. 2, de confessis; Cod. lib. 7, tit. 59; Van. Leeuw. Comm. book v. ch. 21.

however, being made by third persons, are receivable on mixed grounds; partly, as belonging to the *res gestæ*, partly, as made against the interest of the person making them, and partly, because of some privity with him against whom they are offered in evidence.

§ 724.¹ In our law, the term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent; ² while the term *confession* is generally used in *criminal law*, and as denoting an *acknowledgment of guilt*. This distinction will be better understood by an example. On the trial of Lord Melville, who was charged (amongst other things) with *criminal* misapplication of moneys received from the Exchequer, the admission of his agent and authorised receiver was held sufficient proof of the fact of such agent having received the public money. But had such admission been tendered in evidence to establish the *criminal* charge of misapplication of money it would have been rejected.³

§ 724A. As the rules of evidence, respectively applicable to admissions and confessions, differ in some respects, the two subjects will be discussed in separate chapters.

§ 724A (i). With regard to all ADMISSIONS, the law, after several changes,⁴ is now embodied in the R. S. C., 1883, Order XXXII.

§ 724A (ii). By Rule 1 of the Order just mentioned, "Any party

¹ Gr. Ev. § 170, almost verbatim.

² *Ld. Melville's trial*, 1806.

³ Lord Chancellor Erskine said:—"This first step in the proof" (namely, the receipt of the money by the agent,) "must advance by evidence applicable alike to civil, as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime": 29 *How. St. Tr.* 764.

⁴ See *Reg.-Gen.*, 2 W. 4, 1832,

reported in 3 B. & Ad. 392, 393; *Reg.-Gen.*, H. T., 4 W. 4, r. 20, 1832, reported in 4 B. & Ad. pp. 2—8; *Reg.-Gen.*, H. T., 1853; 15 & 16 V. c. 76, §§ 117, 118; R. S. C. 1875, Ord. XXXII., rr. 1—4. For the practice on the Revenue side of the Queen's Bench Division, see *Reg.-Gen.*, 24 V. r. 17; 6 H. & N. xiii.; for that in proceedings under the Public Worship Regulation Act, 1874, 37 & 38 V. c. 85, see *Reg.-Gen.*, 22 Feb. 1879, r. 46, and Form 39, cited 4 P. D. 261, 284; for that to be used in the Court of Probate, see Rules of 1862, for Ct. of Prob. in contentious business, r. 72, and Form No. 20. The Rules of 1865, 1869, 1875, 1877, and 1880, for the Ct. of Div. and Mat. Causes, are, for some unaccountable reason, silent on this subject.

to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.”¹

§ 724A (iii). Admissions,² properly so called, are properly the subject of a treatise upon Practice, and Practice is not the subject of this work. Therefore the matter of admissions will be only here dealt with in a cursory way, and with a view to those points which are most likely to arise in actual practice at Nisi Prius. For further information the reader is referred to one of the well-known works upon Practice.

§ 724A (iv). Subject to these general reservations, it may be noted that admissions are principally of two kinds, viz., (a.) Admissions of *documents*; and (b.) Admissions of *facts*.

§ 724A (v). As to admissions of *documents* in the High Court, Rule 2 of R. S. C., Order XXXII., provides that “Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.”³

§ 724B. The rule governing notices to admit documents, which has been set out in the preceding paragraph,⁴ does not specify any exact time at which such notice must be given. But such a notice must be given a reasonable time before trial. Where, however, it was given on a plaintiff’s behalf to the defendant’s agent in town

¹ If a party admits all the facts pleaded against him, the other side cannot call evidence. See *The Hardwick*, 1883 (Sir James Hannen); *Urquhart v. Butterfield*, 1888, C. A.

² Admissions between co-defendants under this rule, to which the plaintiff is not a party, are not included in an order against him or in his favour for general costs of the

action. See *Dodds v. Freke*, 1884. As to the practice generally, see Order XXXII. in the *Annual Practice*.

³ By Rule 3 of Order XXXII., a Form of “Notice to admit Documents” is furnished, which is Form No. 11 in Appendix B.

⁴ Viz., Order XXXII. r. 2.

only four days before the commission day at Newcastle, who two days afterwards refused to admit the documents without objecting to the sufficiency of the notice, or requiring further time,—the plaintiff was, however, held entitled to the costs of proof.¹ If an admission be made “with a saving of all just exceptions,” it so far recognises the general character and accuracy of the documents, that no objection can subsequently be taken to the *authenticity* of any part of them,² or to their reception in evidence on the ground of any interlineation, however material, appearing upon them.³ Unless this were so, great inconveniences would follow; for as one main object of inducing a party to admit under notice, is to dispense with the necessity of formal proof of the instrument, it would obviously open a door to fraud, if the party admitting were at liberty afterwards to object to an interlineation, which the attesting witness might alone be enabled to explain.⁴ Accordingly, where a party admitted a deed as “the counterpart of a lease,” an objection at the trial, that it was in fact a lease, and as such inadmissible for want of a sufficient stamp,⁵ was overruled;⁶ and a party who admitted an instrument, specified in the notice as bearing date the 10th August, was not allowed to call on his opponent for an explanation, though on the production of the instrument it was evident that the date “August” had been written on an erasure.⁷

§ 724c. A variance, too, in the description of the document, if not of a nature to mislead, will not release the admitting party from his obligation. For instance, an admission will not be vitiated because the date of a promissory note, otherwise correctly described in the notice to admit, is misstated.⁸ A party will not, however, be entitled to the costs of proving any document specified in the notice, unless the witness called to establish this proof has, at least in his examination in chief, been questioned to no other fact.⁹ And, when a notice to admit documents is given, all that

¹ *Tinn v. Billingsley*, 1835.

² *Hawk v. Freund*, 1858 (Byles, J.).

³ *Freeman v. Steggall*, 1849.

⁴ *Id.* 203 (Coleridge, J.).

⁵ See now 54 & 55 V. c. 39 (“The Stamp Act, 1891”), § 72.

⁶ *Doe v. Smith*, 1838.

⁷ *Poole v. Palmer*, 1842 (Rolfe, B.).

⁸ *Field v. Hemming*, 1836 (Ld. Abinger); *Bittleston v. Cooper*, 1845.

⁹ *Stracey v. Blake*, 1835 (Ld. Abinger).

can fairly be asked is, that the handwriting or due execution of the papers specified should be admitted; so that where a party includes in his notice *a demand to admit the authority* by which the documents had been written, and, on the other side refusing generally to make the admission as prayed, proves the documents at the trial, he is not entitled to recover from his opponent the costs of such proof.¹

§ 724D. It is not necessary to show that the admitting party has actually examined the documents mentioned in the notice, if he has had an opportunity of doing so;² and it seems to be unnecessary to identify the document produced at the trial with the one inspected, provided that it corresponds with the description contained in the notice.³ On two occasions, however, the necessity for such evidence has been urged⁴ (if not acknowledged by the court); and it will generally be prudent to be prepared with such proof, or, at least, to have the documents that are to be produced signed or marked by the party making the admission.

§ 724D (i). Though a notice to admit do not contain any saving of all just exceptions, the party admitting may still rely on any valid objection to the admissibility of a document specified in it. Therefore, where a plaintiff admitted that a paper was a copy of a letter from himself to a defendant, who had suffered judgment by default, this was held not to entitle the other defendant to put in the copy, without first accounting for the non-production of the original, or tracing it to the plaintiff's possession, and proving the notice to produce.⁵

§ 724E. Rule 2 of Order XXXII. extends, moreover, to every document which a party purposes to adduce in evidence, whether or not it be in his custody or control,⁶ and whether or not it be put in issue by the pleadings.⁷ Neither will the case be varied though the opposite party may have already, irrespective of the

¹ Oxford, Worc., & Wolverh. Ry. Co. v. Scudamore, 1857.

² Doe v. Smith, 1838 (Patteson and Coleridge, JJ.).

³ Id., Coleridge, J., who observed, that "to require such evidence would be multiplying proofs, so as to defeat the rule of court."

⁴ Clay v. Thackrah, 1839 (Ld. Denman); Doe d. Tindal v. Roe, 1836 (Ld. Abinger).

⁵ Sharpe v. Lamb, 1840. See Goldie v. Shuttleworth, 1807; Rochfort v. Sedley, 1861 (Ir.).

⁶ Rutter v. Chapman, 1841.

⁷ Spencer v. Barough, 1842.

notice, refused in positive terms to make any admission on the subject.¹ A party may even, as it would seem, be served with notice to admit a foreign judgment, or other documents in a foreign court, provided that his opponent will give him time to inspect them abroad, and pay his expenses incurred in so doing.² Still, the rules do not apply where ancient records of a public nature require, not proof, but translation and explanation, or where affidavits which have been filed must be produced by an officer; and, consequently, a party is entitled to the costs, either of a witness called to explain and translate the records, or of the officer who produced the affidavits, even where the other side were not previously called upon to admit these documents.³

§ 724f. In consenting to admit for the purposes of a trial, care must be taken lest, by the words used in the notice to admit, the party admitting should be entrapped into making a larger admission than he intended. Where⁴ the holder of a bill of exchange sued the acceptor, and the defendant's solicitor had written a letter admitting "that the acceptance to the bill on which the action is brought is in the defendant's handwriting," it was held that, though a plea denying the acceptance had been subsequently pleaded, the admission contained in the letter established a *prima facie* case on behalf of the plaintiff without the production of the bill itself. Again, in an action⁵ against three persons on a bill of exchange alleged to have been accepted by them under the style of "The Newbridge Coal Company," an admission under a notice to admit, which stated the bill to have been "accepted by Bishop *for the defendants* as the Newbridge Coal Company," was held to be not only an admission of the actual signature of Bishop, but to preclude the defendants from denying that he had authority to bind them by his acceptance. This last decision is certainly one *strictissimi juris*; and probably it would not be upheld at the present day.⁶

§ 724g. In the County Courts, the Rule which governs notices to

¹ *Spencer v. Barough*, 1842.

² *Smith v. Bird*, 1835.

³ *Bastard v. Smith*, 1839.

⁴ *Chaplin v. Levy*, 1854.

⁵ *Wilkes v. Hopkins*, 1845. See, also, *Hunt v. Wise*, 1859.

⁶ See *Pilgrim v. Dorchester Ry. Co.*, 1835

admit documents is as follows:—Where a party desires to give in evidence any document, he may, not less than *five* clear days before the trial, give notice¹ to any other party in the action or matter who is competent to make admissions, requiring him to *inspect and admit* such document; and if such other party shall not within *three* days after receiving such notice make such admission, any expense of proving the same at the trial shall be paid by him, whatever be the result of the action, unless the court shall otherwise order; and no costs of proving any document shall be allowed unless such notice shall be given, except in cases where, in the opinion of the registrar on taxation, the omission to give such notice has been a saving of expense.²

§ 724H. Coming now to the subject of notices to admit *facts* in the High Court, Rule 4 of R. S. C., Order XXXII., provides:—“Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any *specific fact or facts* mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.”³

¹ C. C. R. 1889, Form 90. This is the same as Form 11 in Appendix B. to R. S. C., referred to ante, p. 473.

² C. C. R. 1889, r. 5.

³ Rule 5 provides, that “A notice to admit facts shall be in the Form

No. 12, in Appendix B., and admissions of facts shall be in the Form No. 13 in Appendix B., with such variations as circumstances may require.”

Rule 6 provides, that “any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just.”

Rule 7 provides, with respect to the mode of proof, that “an affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof be required;” and by virtue of Rule 9, the costs occasioned by any notice to admit unnecessary documents, “shall be borne by the party giving such notice.”

§ 724i. In the County Court, notices to admit *facts* and admissions thereof, are governed by the following Rules of County Courts, Order IX. :—

(7.) “Any party may by notice in writing, according to the form in the Appendix,¹ at any time not later than six clear days before the return day, call on any other party to admit,² for the purposes of the action, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same by the delivery of a written admission of the fact or facts as aforesaid, signed by the party, his solicitor, or agent, within three clear days before the return day, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the action, matter, or issue may be, unless at the trial the court certify that the refusal to admit was reasonable, or unless the court shall at any time otherwise order. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular action, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any

¹ Appendix to C. C. Rules, Form 92A, corresponding to Form No. 12 in Appendix B. to R. S. C.

² Id., Form 93B, corresponding to Form No. 13 in Appendix B. to R. S. C.

person other than the party giving the notice : provided also, that the judge or registrar may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.”¹

(8.) “An affidavit of the solicitor or his clerk of the due signature of any admissions made in pursuance of this order, shall be sufficient evidence of such admissions, if evidence thereof be required.”²

§ 725. It will now be convenient to discuss the general law of admissions, apart from any mere rules of Practice. Here the *first important rule* to be borne in mind is, that *the whole statement containing the admission must be taken together*; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true, yet, unless the whole is received, the true meaning of the part, which is evidence against him, cannot be ascertained.³ But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit; but the jury must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him.⁴

§ 726. Simple as this rule appears, its practical application is not without difficulty. It will therefore be convenient briefly to refer to a few of the leading decisions on it. First, such rule *applies equally both to written and to verbal admissions*. Consequently, where a defendant has rendered a debtor and creditor account to the plaintiff, which the latter produces in proof of his demand, it will be equally admissible in evidence of the defendant's set-off;⁵

¹ This rule corresponds to R. S. C., Ord. XXXII. r. 4, *supra*, p. 477.

² Corresponding to R. S. C., Ord. XXXII. r. 7, *supra*, p. 478.

³ *Thomson v. Austen*, 1823 (Abbott, C.J.); *Fletcher v. Froggatt*, 1827 (*id.*); *Cobbett v. Grey*, 1849.

⁴ *Bermon v. Woodbridge*, 1781

(*Ld. Mansfield*); *Smith v. Blandy*, 1825 (Best, C.J.); *Cray v. Halls*, 1825 (Abbott, C.J.). See, also, *Whitwell v. Wyer*, 1814 (Am.); *Garey v. Nicolson*, 1840 (Am.); *Kelsey v. Bush*, 1842 (Am.).

⁵ *Randle v. Blackburn*, 1813.

though the plaintiff will generally be at liberty, while relying on the creditor side of the account, to impeach items which appear on the debtor side.¹ Where, however, to an action on an attorney's bill of costs, the defendant pleaded a set-off, and put in an account furnished to him by the plaintiff, in which the plaintiff credited himself for the amount of his bill, and debited himself for the amount of goods sold, it was held that the defendant could not exclude from the consideration of the jury so much of such account as related to the bill of costs, on the ground that no signed bill had been delivered; since the non-delivery of a signed bill does not bar the debt, but merely, if insisted on, prevents its recovery by action.²

§ 727. When the admission is contained in an affidavit, written examination,³ signed pleading,⁴ answer,⁵ plea⁶ in Chancery, or other document complete in itself, delivered under the old system of pleading and practice, the whole document is required to be read, though the jury are not bound to give equal credit to every part of it, and they frequently lent an academic faith to such portions as make in favour of the declarant.⁷ So stringent is this rule, that where, in consequence of technical objections which had been taken to the first answer to a bill in Chancery, a second answer had been sent in, defendant was allowed to insist upon having such second answer also read, in order to explain what he had sworn in his first answer.⁸ Moreover, a party, against whom an answer in Chancery is produced, may have the whole bill read as part of his adversary's case, on the ground that, like the ordinary case of a conversation, the answers of a party cannot be given in evidence against him without also proving the questions which

¹ *Rose v. Savory*, 1835. See *Moorhouse v. Newton*, 1849.

² *Harrison v. Turner*, 1847.

³ In *Prince v. Samo*, 1838, *Cole-ridge, J.*, asked whether the question had ever been decided as to depositions? Counsel replied that no express decision had been found.

⁴ *Marianski v. Cairns*, 1851-2. In the Supreme Court the rule respecting the signing of pleadings is *R. S. C.* 1883, *Ord. XIX. r. 4.*

⁵ See *Cons. Ord. Ch. Ord. XV. rr. 5, 6.*

⁶ Pleas in Chancery, where the matter of the plea did not appear upon record, must have been upon oath, and be signed by the parties pleading: *Cons. Ord. Ch. 1860, Ord. XIV. rr. 2, 3.*

⁷ *Bermon v. Woodbridge*, 1781 (*Ld. Mansfield*); *Blount v. Burrow*, 1792 (*Ld. Hardwicke*); *Baildon v. Walton*, 1847; *Percival v. Caney*, 1851 (*Knight-Bruce, V.-C.*).

⁸ *R. v. Carr*, 1669; *Ld. Bath v. Bathersea*, 1695; *Lynch v. Clerke*, 1696.

drew forth the answers.¹ The jury, however, might in such case be warned, that the statements in the bill were not admissions of the facts contained therein ; it being notorious that allegations, not consistent with fact, were frequently introduced into a bill, for the sole purpose of eliciting the truth from the opposite party.²

§ 728. Where³ plaintiffs, who were assignees of a bankrupt, gave in evidence an examination of the defendant before the commissioners, as proof that he had taken certain property, it was held that they thereby made his cross-examination evidence in the cause ; and as, in this cross-examination, he had stated that he had purchased the property under a written agreement, a copy of which was entered as part of his answer, this statement was considered as *some evidence* on his behalf of the agreement and its contents ; and that, too, though the absence of the document was not accounted for, nor had notice been given to the plaintiffs to produce it. Again, in an action against a magistrate for assault and false imprisonment, the warrant of commitment which had been put in by the plaintiff was held to be proof on behalf of the defendant of the information recited in it ;⁴ and in an action against a sheriff, an undersheriff's letter which had been produced by the plaintiff to affect the defendant, was held to be some evidence also of certain facts stated therein, which tended to excuse the sheriff.⁵

§ 729. It seems on the whole, however, to be now tolerably clear that where a sheriff or bailiff seeks to justify a seizure as against any party but the execution debtor, he must produce both the writ of execution and the judgment, and he cannot be relieved from offering such proof by any recital in the warrant which his opponent may put in evidence.⁶

§ 730. The rule requiring the whole statement containing the admission to be taken together, has long prevailed to a considerable extent in equity. Therefore, where a defendant had been

¹ Pennell v. Meyer, 1838 (Tindal, C.J.).

² Id.

³ Goss v. Quinton, 1842.

⁴ Haylock v. Sparke, 1853. This case seems to overrule Stevens v. Clark, 1842 (Cresswell, J.).

⁵ Haynes v. Hayton, 1837 ; recognized in Bessey v. Windham, 1844.

⁶ White v. Morris, 1852 ; Glave v. Wentworth, 1844 (Parke, B.) ; Martin v. Podger, 1770 ; Lake v. Billers, 1698. See, also, Bowes v. Foster, 1858 (Watson, B.). See, however, contra, Bessey v. Windham, 1844 ; and see, also, Ogden v. Hesketh, 1849.

examined on two days before commissioners of the Court of Bankruptcy, and the plaintiff read the examination taken on the first day, he was compelled to read that also which was taken on the second day;¹ and where a plaintiff in equity read that part of the defendant's account-book which charged the latter, the defendant was allowed to read the discharging part as evidence for himself.² With respect, however, to the old *answers* and *examinations in Chancery*,—which have now been superseded by *statements of defence* and *answers to interrogatories*,—the equity rule was far less comprehensive than that which was recognised at common law; and although, if a party in equity admitted, in his examination or answer, that he had received a sum, and then added in the same sentence that he had immediately paid it away,—or if he stated in a still more general form, that a person gave him 100*l.* as a present,—the charge and the discharge would be so blended together that the one could not be admissible without the other;³ still, if he once admitted the receipt of money as an independent fact, he could not refer to other parts of his examination or answer, much less to affidavits sworn by him, or to schedules attached to his answer, for the purpose of showing that he had liquidated the amount so admitted to have been received, by separate and independent payments.⁴ So, if a plaintiff read a passage in the answer, as evidence of a particular fact, the defendant could not read other parts, even though grammatically connected with such passage by conjunctive particles, unless they were really explanatory of its meaning.⁵ If, in order to understand the sense of the passage on which the plaintiff relied, it was necessary to read on the part of the defendant other portions of the answer, these portions would be evidence only so far as they were explanatory; and any new facts introduced therein, though so immediately connected with the parts admitted as to be incapable of subtraction, would be con-

¹ *Smith v. Biggs*, 1832 (Shadwell, V.-C.).

² *Carter v. Ld. Coleraine*, 1740; *Blount v. Burrow*, 1792 (Ld. Hardwicke).

³ *Ridgway v. Darwin*, 1802 (Ld. Eldon); *Thompson v. Lambe*, 1802 (id.); *Robinson v. Scotney*, 1816 (Sir

W. Grant, M.R.). See, also, *Awdley v. Awdley*, 1690; *Hampton v. Spencer*, 1693; *Freeman v. Tatham*, 1846.

⁴ Cases cited in last note.

⁵ *Davis v. Spurling*, 1829 (Leach, M.R.).

sidered as not read.¹ This rule seems to have been adopted in consequence of the subtle contrivances of equity draftsmen, whose skill formerly consisted in so grammatically blending important points of the defendant's case with admissions that could not be withheld, as to render it necessary that both should be read in conjunction, and thus to prove their client's case by means of his own unsupported statements.²

§ 731. In accordance with the practice in equity as explained in the preceding section, it now is provided,³ that "any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

§ 732. The whole of a document may, as a general rule, be read by the one party when the other has already put in evidence a partial extract.⁴ But this rule will not warrant the reading of *distinct entries* in an account-book,⁵ or *distinct paragraphs* in a newspaper,⁶ unconnected with the particular entry or paragraph relied on by the opponent; nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation books, or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers, or entries, or letters.⁷ If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books may throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission; for such party is not bound to know whether they will or not; and moreover the light may be a false one.⁸

§ 733. A similar rule prevails in the case of a *conversation*, in

¹ Bartlett v. Gillard, 1826 (Ld. Eldon).

² Gr. Ev. § 13.

³ By R. S. C. Ord. XXXI. r. 24.

⁴ R. v. Queen's Cy. JJ., Re Feehan, 1882 (Ir.).

⁵ Catt v. Howard, 1820 (Abbott, C.J.); Reeve v. Whitmore, 1865.

⁶ Darby v. Ouseley, 1856.

⁷ Sturge v. Buchanan, 1839.

⁸ Id. (Ld. Denman).

which several distinct matters have been discussed. If a part of a conversation is relied on as an admission, the adverse party can give in evidence *only* so much of the same conversation as may explain or qualify the matter already before the court.¹ For example, a witness who has acknowledged on cross-examination that he has heard the plaintiff admit on oath that he had repeatedly been insolvent, cannot be asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that certain money was given to him, and not lent.²

§ 734. With regard to *letters*, a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production.³ For, in such a case, the letters, to which those put in were answers, are in the adversary's hands, and he may produce them if he thinks them necessary to explain the transaction.³ But if a plaintiff puts in a letter by the defendant, on the back of which is something written by himself, the defendant is entitled to have the whole read; ⁴ and where a defendant laid before the court several letters between himself and the plaintiff, he was allowed to read a reply of his own to the last letter of the plaintiff, it being considered as a part of an entire correspondence.⁵

§ 735. Questions not unfrequently arise as to the admissibility of letters, account-books, &c., which are tendered as admissions, in cases where their existence or contents have been discovered by means of a compulsory examination or answer of the party either in previous bankruptcy proceedings, or in some other legal inquiry; and it is often contended in such cases that the documents referred to therein cannot be read, without first producing the examination

¹ It was at one time held, on high authority, that if a witness were questioned as to a statement made by an adverse party, such party might lay before the court all that was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit (*The Queen's case*, 1820 (Abbott, C.J.), H. L.); but a sense of the extreme injustice that might result

from allowing such a course of proceeding has induced the courts, in later times, to adopt the stricter rule stated in the text: *Prince v. Samo*, 1838.

² *Prince v. Samo*, 1838.

³ *Ld. Barrymore v. Taylor*, 1795 (Ld. Kenyon); *De Medina v. Owen*, 1850 (Parke, B.).

⁴ *Dagleish v. Dodd*, 1832 (Taunton, J.).

⁵ *Roe v. Day*, 1836 (Park, J.).

or answer. But—whatever the correct doctrine may be with respect to documents referred to in and *actually annexed* to an examination or answer—no rule of law will, in other cases, compel a party to treat the document on which he relies as part of a previous examination or answer.¹

§ 736. It is even doubtful whether, if a document be annexed to an old answer in Chancery, the answer need be read, if it have no connection with the cause in which the document is produced.² If, however, the letter in question be not written by the party against whom it is offered, though contained in the schedule of his answer, and if it be merely used against him, as raising an inference from possession that he knew of its contents, and had acted upon it, common fairness requires³ that the letter should not be read without the answer; for the answer of the party might contain such an explanation of the circumstances under which the letter came into his possession, as also such a contradiction of any passages in it which seemed to bear against his rights, as utterly to neutralize its effect. If, in making a verbal admission, a person refer to a written paper, without which the admission is incomplete, such paper must be produced, before the statement can be used as evidence against him.⁴

§ 737.⁵ Where an admission, whether oral or in writing, contains matters stated *as mere hearsay*, it is questionable whether such matters can be received in evidence. If tendered *against* the party making the statement, they would seem (like hearsay declarations against interest⁶) to be inadmissible unless coupled with a simultaneous statement by the party who has made the admission that he believes such hearsay to be true, and at any rate they are entitled to very little weight. When they are offered *in favour* of the party making the admission they would appear to be equally inadmissible or worthy of weight. This is on the ground that one

¹ Long v. Champion, 1831; Sturge v. Buchanan, 1839; overruling previous Nisi Prius decisions in Yates v. Carnsew, 1828 (Ld. Tenterden); Holland v. Reeves, 1835 (Alderson, B.).

² Long v. Champion, 1831 (Ld. Tenterden).

³ Hewitt v. Piggott, 1831 (Tindal, C.J.).

⁴ Jacob v. Lindsay, 1801; Falconer v. Hanson, 1808.

⁵ Gr. Ev. § 202, in part.

⁶ As to which see Ld. Trimles-town v. Kemmis, 1843, H. L.; ante, § 685.

party, by reading a part of the answer which his opponent had pleaded to a bill filed for discovery, "makes the whole admissible only so far as to waive any objection to the competency of the party making the answer, and he does not thereby admit as evidence all the facts which happened to have been stated therein by way of hearsay only."¹ On the other hand, it may perhaps be successfully urged, that since an answer is offered as the admission of the party against whom it was read, the whole should be laid before the jury, for the purpose of showing under what impressions the admission was made, though some part of it were stated only upon hearsay and belief.

§ 738. The rule requiring the whole of an admission to be taken together is so important, that a judge will always do well to explain distinctly to the jury its bearing and extent, whenever any portion of it is favourable to the party against whom a statement is read; but his neglecting to do so in a case where it is clear that the jury, in fact, took the whole into their consideration, will not amount to such a misdirection as to warrant a new trial.²

§ 739. A second rule respecting admissions is, that they are receivable in evidence *though they relate to the contents of a written instrument*, even when such contents are directly in issue.³ This rule has already been discussed, and it is therefore needless to do more here than thus shortly to refer to it.⁴

§ 739A. A third rule as to admissions, is that any *verbal* admissions or declarations of the parties *which are not put directly in issue by the pleadings*, and which, consequently, have not been open to explanation or disproof, must be rejected, or at any rate must not be relied upon.⁵ This rests upon the ground, that under such circumstances the reception of evidence would facilitate the production of false testimony.⁶ The rule does not strictly extend to *written* admissions; yet the fact of their not being put in issue by the pleadings will naturally detract from their weight, as the party

¹ *Roe v. Ferrars*, 1801 (Chambre, J.). See, also, *Kahl v. Jansen*, 1812.

² *Beckham v. Osborne*, 1843.

³ *Slatterie v. Pooley*, 1840.

⁴ *Ante*, §§ 410—415. See, also, *ante*, § 413, as to the admissibility of

a *confessio juris*.

⁵ *Austin v. Chambers*, 1837, H. L.; *Attwood v. Small*, 1838; *Copland v. Toulmin*, 1840.

⁶ *Austin v. Chambers*, 1838 (Ld. Cottenham).

against whom they are offered in evidence will, in such case, have had no opportunity of explaining them.¹

§ 740.² With respect to the *person, whose admissions may be received*, the general doctrine is, that the declarations of a *party to the record*, or of one *identified in interest with him*, are, as against such party, receivable in evidence.³ Declarations proceeding from a stranger, who is still living, are, however, almost uniformly rejected;⁴ and, though the declarant be dead, his declarations can in general only be admitted upon some of the special grounds already considered.⁵ The admissions of parties to the record are receivable in evidence whether made before or after the party had arrived at full age; and, therefore, in an action against an adult for necessities supplied during his minority, admissions made, and letters written by him while under age, may be proved on behalf of the plaintiff.⁶

§ 741. The courts, however, now recognise a wide distinction between *nominal* and *real* parties. Therefore, if a consignee use the name of the consignor in proceeding against a shipowner, or if the assignee of a bond sues the obligor in the name of the original obligee, or if a cestui que trust brings an action in the name of his trustee, Courts of Nisi Prius, recognising the principles of equity, will reject the admission of the nominal plaintiff as evidence for the defendant.⁷ For example, although a receipt in full may have been given by the nominal plaintiff to the defendant, the parties really interested may show that the money has in fact never been paid:⁸ and if a release from a nominal plaintiff were pleaded in bar, a prior assignment of the cause of action, with notice thereof

¹ *McMahon v. Burchell*, 1846 (Ld. Cottenham); *Crosbie v. Thompson*, 1847 (Ir.) (Brady, C.); *Swift v. McTiernan*, 1848 (Ir.) (id.); *Malcolm v. Scott*, 1843; and see *Margareson v. Saxton*, 1835; *Fitzgerald v. O'Flaherty*, 1827 (Ir.); and *Steuart v. Gladstone*, 1878 (Fry, J.).

² Gr. Ev. § 171, in part.

³ *Spargo v. Brown*, 1829 (Bayley, J.).

⁴ *Barough v. White*, 1825 (Little-dale, J.). As to when they are admissible, see post, §§ 759—765.

⁵ Ante, § 607.

⁶ *O'Neill v. Read*, 1845 (Ir.). See 37 & 38 V. c. 62.

⁷ See *Payne v. Rogers*, 1785; *Lagh v. Legh*, 1820; *Innell v. Newman*, 1821; *Hickey v. Burt*, 1816; *Mounstephen v. Brooke*, 1819; *Manning v. Cox*, 1823; *Barker v. Richardson*, 1827; *Johnson v. Holdsworth*, 1835. This is contrary to the practice which formerly prevailed at common law.

⁸ See *Wallace v. Kelsall*, 1840 (Parke, B.), explaining *Skaife v. Jackson*, 1824; and *Farrar v. Hutchinson*, 1839.

to the defendant, and an averment that the suit was prosecuted by the assignee for his own benefit, would be a good answer. The nominal plaintiff is never permitted to, in any manner, injuriously affect the rights of his assignee in an action.¹

§ 742. On the principle just stated, the declarations of a *prochein amy* or *guardian* are not receivable in evidence against an infant plaintiff, since, though the names of these persons appear on the record, they are not really parties to the action, but merely officers of the court specially appointed to look after the interests of the infant.² A solemn admission may, however, be made in a pending suit, for the purpose of that trial only, by a guardian or *prochein amy* in good faith, and will be equally admissible with like admissions by the solicitor in the cause.³

§ 743. When several persons are *jointly* interested in the subject-matter of a suit, the general rule is, that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately; provided the admission relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.⁴ Accordingly, the representation or misrepresentation of any fact by one partner, with respect to some partnership transaction, will bind the firm;⁵ if it appear on the record, that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, statements made by one of such proprietors are admitted on the part of the defendant,⁶ and an admission by one of two joint and several obligors is evidence against the co-obligor, even though the joint defence raise a controversy as to the subject-matter of the admission.⁷

¹ See *Welch v. Mandeville*, 1816 (Am.); *Mandeville v. Welch*, 1820 (Am.).

² *Eccleston v. Speke*, alias *Petty*, 1689; *Cowling v. Ely*, 1818 (Abbott, J.); *Webb v. Smith*, 1824 (Littledale, J.); *Morgan v. Thorne*, 1841 (Parke, B.); *Sinclair v. Sinclair*, 1845; *Eccles v. Harrison*, 1848. These cases over-rule *James v. Hatfield*, 1734. See *Doe v. Roberts*, 1847, cited ante,

§ 605.

³ See post, § 772.

⁴ *Whitcomb v. Whiting*, 1781; *Wood v. Braddick*, 1808.

⁵ *Rapp v. Latham*, 1819; *Thwaites v. Richardson*, 1790; *Nicholls v. Dowding*, 1815 (Ld. Ellenborough); *Lucas v. De la Cour*, 1813.

⁶ *Kemble v. Farren*, 1829 (Tindal, C.J.).

⁷ *Crosse v. Bedingfield*, 1821.

§ 744. The Legislature has, however, greatly restricted the common law on this subject. For Lord Tenterden's Act¹ rendered mere verbal acknowledgments insufficient to take joint, or joint and several, debts out of the Statute of Limitations, by enacting that "in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments" contained in the old Statute of Limitations,² "or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed *by the party chargeable thereby*." It also provides, "that where there shall be two or more joint-contractors, or executors or administrators of any contractor, no such joint-contractor, executor, or administrator, shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them;"³ *provided always, that nothing herein contained shall alter, or take away, or lessen the effect of, any payment of any principal or interest made by any person whatsoever*: provided also, that in actions to be commenced against two or more such joint-contractors, or executors, or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by [the Act of Jac. 1,⁴] or this Act, as to one or more of such joint-contractors, or executors, or administrators, shall nevertheless be entitled against any other or others of the defendants, by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."⁵

§ 745. This enactment having required that the written acknow-

¹ 9 G. 4, c. 14, § 1. See ante, § 600. Similar restrictions prevail in Ireland (see 16 & 17 V. c. 113, § 24), and in Massachusetts (see Rev. Stat. c. 120, § 14).

² 21 J. 1, c. 16 ("The Limitation Act, 1623").

³ See ante, §§ 600, 601.

⁴ Viz., 21 J. 1, c. 16 ("The Limitation Act, 1623").

⁵ § 4 of 9 G. 4, c. 14, enacts, that the said Act of James, and that Act, "shall apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant."

ledgment should be *personally* signed by the party chargeable, and having left untouched the law which allowed part payment by one of several co-debtors to operate as a bar of the statute with respect to the others, it was enacted by the Mercantile Law Amendment Act, 1856,¹ that ² “an acknowledgment or promise made or contained by or in a writing signed by an *agent* of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself;” and by another section³ that “when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the” Statutes of Limitations,⁴ “so as to be chargeable in respect or by reason only of payment⁵ of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.”

§ 746. Under this last enactment, where two partners had given a promissory note in the name of the firm, and one of them afterwards died, leaving his co-partner executor; the latter, after continuing to pay interest on the note for some years, became bankrupt; and, on a defence setting up the Statute of Limitations, in answer to a claim by the holder of the note against the assets of the deceased partner’s estate, it was held that the payments must be presumed to have been made by the bankrupt in his character of surviving partner, and not as executor of his deceased partner.⁶ It has also, under such enactment, been ruled that payment by one co-debtor, with the knowledge and mere consent of another, does not deprive that other of the benefit of the Statute of Limitations.⁷

¹ 19 & 20 V. c. 97, amended by 53 & 54 V. c. 39, and by 56 & 57 V. c. 71 (“The Sale of Goods Act, 1893”).

² § 13.

³ § 14. This section applies to § 24 of 16 & 17 V. c. 113 (Ir.), as well as to § 1 of Ld. Tenterden’s Act. As to India, see the Indian Act, IX. of

1871, § 20, and Dinomoyi Debi v. Roy Luchmissut Singh, 1879 (P. C.).

⁴ 21 J. 1, c. 16, § 3 (“The Limitation Act, 1623”); 3 & 4 W. 4, c. 42, § 3; 16 & 17 V. c. 113, s. 20 (Ir.).

⁵ See Cockrill v. Sparkes, 1862.

⁶ Thompson v. Waithman, 1856 (Kindersley, V. C.).

⁷ Jackson v. Woolley, 1858.

§ 747. The Real Property Limitation Act, 1874,¹ which came into operation on the 1st of January, 1879, contains a provision² respecting acknowledgments of a mortgagor's title by one of several mortgagees in possession, which is the same in principle as the enactments of Lord Tenterden's Act.

§ 748. Where a member of a partnership has been adjudged bankrupt, and an action brought, under the authority of the Court of Bankruptcy, in the joint names of the trustee and of the bankrupt's partner, the latter has no power to release the claim to

¹ 37 & 38 V. c. 57.

² § 7. This enactment has been substituted for § 28 of 3 & 4 W. 4, c. 27 ("The Real Property Limitation Act, 1833"), and reduces the period of *twenty* years therein named to a period of *twelve* years—making no other alteration in the law—and is as follows:—"When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within *twelve* years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and, in such case, no such action or suit shall be brought but within *twelve* years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there

shall be *more than one mortgagee*, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such *acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under, him or them, or any person or persons entitled to any estate or estates, interest or interests, to take effect after, or in defeasance of, his or their estate or estates, interest or interests; and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."* See *Richardson v. Younge*, 1871, C. A.

which the action relates, but any attempted release by him,¹ is expressly rendered void.²

§ 749. An admission made by one of several parties in *fraud* of the others jointly interested with him, and in collusion with the opponent, is, moreover, on these facts being shown, invalid as against the others.³

§ 750. To render the admission of one person admissible against another, it must relate to some matter in which either both were *jointly* interested, or one was interested *derivatively* through the other; and a *mere community of interest* will not be sufficient. Thus, the admission of a servant of a negligent act is no evidence against his master.⁴ Again, if an action be brought against two persons in partnership as part-owners of a vessel, an admission by one, as to a matter which was not a subject of co-partnership, but only of co-part ownership, is inadmissible against the other;⁵ and where two executors were sued as such on a covenant by a testator for quiet enjoyment, the plaintiff, to establish this fact, was not allowed to put in evidence a declaration by one of the defendants, to the effect that he and his co-defendant both had a lawful title *in their own right* through the testator,⁶ since this admission had not been made by the party as executor, or in relation to any matter touching the testator's estate; but it simply referred to something of which the two defendants had taken advantage in their individual capacities. Indeed, it may even be doubted whether an express promise by one executor in his representative character will bind the remaining executors in their representative characters.⁷ Certainly the admission of the receipt of money by one of several

¹ By 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 113. It would probably be void even without express enactment. See next section, and *supra*, § 741.

² But the interest of the partner may be protected, "notice of the application for authority to commence the action must be given him," and if he claims no benefit therefrom, "he shall be indemnified against costs."

³ See *Rawstorne v. Gandell*, 1846;

Phillips v. Clagett, 1843; *ante*, § 741.

⁴ *Johnson v. Lindsay*, 1889.

⁵ *Jaggers v. Binnings*, 1815 (Ld. Ellenborough). See *Brodie v. Howard*, 1855.

⁶ *Fox v. Waters*, 1840. See *Stanton v. Percival*, 1854.

⁷ *Tulloch v. Dunn*, 1826 (Abbott, C.J.); cited with approbation by Parke, B., in *Scholey v. Walton*, 1844, questioning *Atkins v. Tredgold*, 1823; and *McCulloch v. Dawes*, 1826, *contra*.

C. IX.] ADMISSIONS BY ONE OF SEVERAL TRUSTEES, ETC.

trustees, who were joint defendants, but were not personally liable, cannot be received to charge the others.¹

§ 751.² On similar principles, where a joint contract is severed by the death of one of the contractors, nothing subsequently done or said by the survivor binds the personal representative of the deceased;³ nor can the acts or admissions of one of several executors bind any surviving executor;⁴ nor the admissions of one tenant in common be receivable against his co-tenant.⁵ Moreover, it has, in America, been decided, that no such privity exists among the members of a board of public officers,⁶ or among several indorsers of a promissory note,⁷ or between executors and heirs or devisees,⁸ as to make the admission of one binding on all. Plainly, the admission of one defendant will not be evidence against any other in an action for negligence, or trespass, or other tort.⁹ Still clearer is it that any such admission will not be evidence against another person in criminal proceedings, since the law cannot recognize any partnership or joint interest in wrong, much less in crime.¹⁰

§ 752. An exception to this last proposition at first sight appears to prevail, where the *inhabitants of townships*, counties, or other territorial divisions of the country, sue or are prosecuted *eo nomine*. But here such inhabitants are, in truth, regarded in the light of a corporation, of which each individual inhabitant forms a component part. Therefore the declarations and admissions of any one of such persons are, not really inconsistently with the rule just discussed, receivable in evidence against the collective body. Accordingly, the declarations of all rateable inhabitants, whether actually rated or not, may be given in evidence for the Crown, in a prosecution against a township for non-repair of a highway, while in a settlement case its opponents may give in evidence declarations by rated

¹ *Davies v. Ridge*, 1802 (Ld. Eldon).

² Gr. Ev. § 176, in part.

³ *Atkins v. Tredgold*, 1823; *Fordham v. Wallis*, 1852-3; *Slaymaker v. Gundacker's Ex.*, 1823 (Am.).

⁴ *Slater v. Lawson*, 1830; *Hathaway v. Haskell*, 1829 (Am.).

⁵ And this even where both are parties to the suit, and in the same interest: *Dan v. Brown*, 1825 (Am.).

⁶ *Lockwood v. Smith*, 1812 (Am.).

⁷ *Slaymaker v. Gundacker's Ex.*,

1823 (Am.).

⁸ *Osgood v. Manhattan Co.*, 1824 (Am.). See, also, *Fordham v. Wallis*, 1852-3.

⁹ *Daniels v. Potter*, 1830 (Tindal, C.J.); *Morse v. Royal*, 1806 (Ld. Erskine). See *R. v. Hardwick*, 1809, where Ld. Ellenborough lays down the rule somewhat too loosely.

¹⁰ *Grant v. Jackson*, 1793 (Ld. Kenyon).

parishioners of a parish.¹ In both cases the value of such evidence will of course vary according to the knowledge and position of the declarant, and will in many instances be exceedingly slight.²

§ 753.³ An *apparently joint interest* is obviously *insufficient* to make the admissions of one party receivable against his companions, *where the reality of that interest is the point in controversy*. A foundation for such evidence must first be laid, by showing, *primâ facie*, that a joint interest exists. Consequently, where in an action against a party for money had and received, plaintiff, to prove the receipt of the money by defendant, tendered certain statements, which had been made by a person whom defendant had taken into partnership subsequently to the transaction in question, such evidence was rejected because a joint liability could not be presumed merely from a subsequent partnership.⁴ The existence of a joint interest which is disputed cannot, moreover, be established by the admission of one of the parties sought to be charged, but must be shown by independent proof. Therefore, in an action against three alleged makers of a promissory note, the admission of his signature by one defendant was under the old law insufficient to entitle the plaintiff to recover against him and the others, though theirs had been proved; the point to be established against all being a joint promise by all;⁵ and in an action seeking to charge several as partners, an admission of the partnership by one is not evidence of it which is receivable against any of the others; but it is only after such partnership is shown by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others.⁶ The admissions are, however, evidence against the party making them, and *he* will be bound thereby, either in an action against him as surviving partner, or even in an action in which he is sued on the joint

¹ *R. v. Hardwick*, 1809; *R. v. Whitley Lower*, 1813; *R. v. Woburn*, 1808.

² *R. v. Adderbury East*, 1843; *R. v. Hardwick*, 1809 (Ld. Ellenborough).

³ Gr. Ev. § 177, in part.

⁴ *Catt v. Howard*, 1820 (Abbott, C.J.).

⁵ *Gray v. Palmers*, 1794.

⁶ *Nicholls v. Dowding*, 1815; *Gibbons v. Wilcox*, 1817; *Grant v. Jackson*, 1793 (Ld. Kenyon); *Van Reimsdyk v. Kane*, 1813 (Am.); *Harris v. Wilson*, 1831 (Am.); *Burgess v. Lane*, 1824 (Am.); *Dutton v. Woodman*, 1852 (Am.).

promise with his co-partners, in which they have let judgment go by default.¹

§ 754. In general, statements in the defence, or in the answers to interrogatories,² of one defendant cannot be read in evidence either for or against his co-defendant. The reasons for this are that, as there is no issue between the defendants, there can have been no opportunity for cross-examination;³ and, moreover, if it were allowed, a plaintiff might, by making one of his friends a defendant, gain a most unfair advantage.⁴ The rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence; nor to cases where they have a joint interest, either as partners or otherwise, in the transaction.⁵ But wherever the admission of one party would be good evidence against another party, the defence of the former may, *à fortiori*, be read against the latter.⁶

§ 755. There would appear to be little doubt but that statements made by parties suing or sued *in a representative character before they were completely clothed with that character*, are not admissible against them, so as to affect the interest of the persons they represent. Lord Tenterden ruled that they are not,⁷ and it is submitted that he was correct. For it would be startling that the assets of a testator, and the consequent rights of legatees, might be affected by some inconsiderate statement made by the executor, before the death of the testator.⁸ Even the sworn admission of a married woman, in answering a bill in Chancery jointly with her husband,—except so far as it related to her separate estate,⁹—has been rejected after his death, as against the wife, as it was considered as the answer of

¹ *Sangster v. Mazarredo*, 1816 (Ld. Ellenborough); *Ellis v. Watson*, 1818 (Abbott, C.J.).

² See *Meyer v. Montriou*, 1846; *Stephens v. Heathcote*, 1860; *Parker v. Morrell*, 1848 (Ld. Cottenham); *Hoare v. Johnstone*, 1838; *Saltmarsh v. Hardy*, 1873 (Ld. Selborne, C.).

³ *Jones v. Turberville*, 1792; *Morse v. Royal*, 1806.

⁴ *Wych v. Meal*, 1734.

⁵ *Petherick v. Turner*, 1802; *Pritchard v. Draper*, 1830-1; *Hiliard v. Phaley*, 1723; *Field v. Holland*, 1810 (Am.); *Clark's Ex. v. Van Reims-*

dyk, 1815 (Am.). See *Parker v. Morrell*, 1848, cited *ante*, § 599.

⁶ *Van Reimsdyk v. Kane*, 1813 (Am.).

⁷ *Fenwick v. Thornton*, 1827. See, also, *Metters v. Brown*, 1863 (Pollock, C.B.); *Plant v. M'Ewen*, 1823 (Am.); *contra*, *Tindal, C.J.*, in *Smith v. Morgan*, 1839.

⁸ See *Legge v. Edmonds*, 1855, which confirms the law as stated in the text.

⁹ *Callow v. Howle*, 1847; *Clive v. Carew*, 1859.

the husband alone.¹ Nor can the affidavit of a guardian of an infant defendant,² or of the committee of a lunatic,³ be read against the infant or lunatic in another suit; though it may be used against the guardian or committee himself, if he afterwards be sued in his private capacity, for it is an admission upon his own oath.

§ 756.⁴ Persons who are not formally parties to a record, but who are *interested in its subject-matter*, are considered by the law as real parties in interest, and accordingly their admissions have the same weight as though they were formally parties. For example, there may be received in evidence against their respective representatives the admissions of the cestui que trust of a bond, so far as his interest and that of the trustee are identical;⁵ those of the persons interested in a policy effected in another's name for their benefit;⁶ those of the shipowners, in an action by the master for freight;⁷ those of the indemnifying creditor, in an action against the sheriff;⁸ those of the deputy-sheriff tending to charge himself, in an action against the high sheriff for the misconduct of the deputy;⁹ those of rated parishioners, in a settlement appeal, where the churchwardens and overseers of the poor are the nominal parties on the record;¹⁰ and, in short, the admissions of any persons who are represented in the action by other parties.¹¹ On similar principles, the declarations of voters against their own votes, whether made before or after the votes were given,¹² and even though inva-

¹ *Hodgson v. Merest*, 1821; *Elston v. Wood*, 1833.

² *Eccleston v. Speke*, alias *Petty*, 1689; *Hawkins v. Luscombe*, 1818; *Story*, Eq. Pl. § 668; Gr. Ev. §§ 24, 323; *Mills v. Dennis*, 1818 (Am.). See ante, § 742.

³ *Beasley v. Magrath*, 1804 (Ir.).

⁴ Gr. Ev. § 180, in part.

⁵ *Hanson v. Parker*, 1749. See, also, *Harrison v. Vallance*, 1822; *May v. Taylor*, 1843 (Maule, J.).

⁶ *Bell v. Ansley*, 1812 (Ld. Ellenborough).

⁷ *Smith v. Lyon*, 1813.

⁸ *Dowden v. Fowle*, 1814; *Proctor v. Lainson*, 1836 (Ld. Abinger); *Dyke v. Aldridge*, 1798; *Young v. Smith*, 1808; *Harwood v. Keys*, 1832.

⁹ *Snowball v. Goodricke*, 1833, questioning the language of Ld.

Kenyon and Lawrence, J., in *Drake v. Sykes*, 1797, which seems to identify the sheriff with the under-sheriff to all intents: *Yabsley v. Noble*, 1697. The declarations of under-sheriffs, or of the sheriff's bailiffs, accompanying official acts, are admissible as parts of the *res gestæ*. See *Jacobs v. Humphrey*, 1834; *Scott v. Marshall*, 1832; *North v. Miles*, 1808 (Ld. Ellenborough); and ante, §§ 583 et seq.

¹⁰ *R. v. Hardwick*, 1809; *R. v. Whitley Lower*, 1813.

¹¹ In *Hart v. Horn*, 1809, an action of replevin, in which the declarations of the person, under whom the defendant made cognizance, were rejected (Heath, J.) as evidence for the plaintiff, is presumed not to be law. See *Welstead v. Levy*, 1831.

¹² *Southampton case*, 1833; *Ripon*

validating such votes on the ground of their having received bribes,¹ are admissible in evidence; since, on a scrutiny, each case is considered as a separate cause, in which the supporter of the vote under discussion and the voter are the parties on the one side, and the opposers of the vote are the parties on the other.²

§ 757. The declarations or admissions must, however, in all cases (as will presently be seen³), have been made while the party making them had some interest in the matter; and they, moreover, are receivable in evidence only so far as the declarant's own interests, or the interests of those who claim through him, are concerned. Thus, if an action be brought by trustees, who represent the interests of a variety of cestuis que trust, before the declaration of a cestui que trust will be admitted at all against a trustee, the nature of the interest of the declarant in the trust estate must be shown, so that it may clearly appear that he alone is entitled to the benefit resulting from the action,⁴—so that the statements of a person beneficially interested as tenant for life are, for instance, not evidence to prejudice the rights of the remainder-men in fee.

§ 758. In applying the above rule, a distinction exists between the position of a *tenant for life* and that of a *tenant in tail*. A tenant for life cannot—unless empowered by some special statute⁵—prejudice, by an admission, the interest of a remainder-man or reversioner. But a tenant in tail is regarded as representing the inheritance, and, therefore, what he says or does will often be binding on the persons entitled in remainder. Accordingly, a release of an equity of redemption by a tenant in tail in possession,⁶ or a decree of foreclosure against him, will bind the remainder-man;⁷ and an acknowledgment by a tenant in tail of the existence of an equity of redemption which would, in the absence of such admission, have been barred by the equitable rule respecting limitations, has the effect, as against the remainder-man, of restoring the right of redemption.⁸

case, 1833; Petersfield case, 1833; New Windsor, 1835; Ennis, 1835; Droitwich, 1835; Bedfordshire, 1785; and other cases cited 2 Rog. on Elect. 139.

¹ Ipswich, 1835; and cases cited 2 Rog. on Elect. 139.

² 2 Rog. on Elect. 139.

³ Post, § 794.

⁴ Doe v. Wainwright, 1838; May v. Taylor, 1843.

⁵ See ante, § 692, note commencing "In Roddam v. Morley," and post, § 1088, note citing same case.

⁶ Reynoldson v. Perkins, 1769.

⁷ Pendleton v. Rooth, 1859 (Stuart, V.-C.).

⁸ Id.

§ 759.¹ In some cases, admissions by *third persons, who are strangers to the suit*, are receivable. This is the case when the issue is substantially upon the mutual rights which, at the particular time of the admission, were respectively possessed by a party to the record and the person who made such admission; in which cases such evidence will in general be let in as would be legally admissible in an action between the parties themselves. Thus, in an action by his trustee, the admissions of a bankrupt, made before the act of bankruptcy, are receivable in proof of the petitioning creditor's debt;² but admissions made after the act of bankruptcy cannot furnish evidence against the trustee, because of the intervening rights of creditors, and the danger of fraud.³

§ 760.⁴ The admissions of a third person are also receivable against, and binding upon, a person who has *expressly referred another to him* for information. Thus, executors who wrote to a plaintiff, that if she wished for further information on a certain subject, she should apply to a certain merchant in the city, were held bound by the replies of the merchant;⁵ where the fact of the delivery of goods by a carman was disputed, a defendant who said, "If he will say that he delivered the goods, I will pay for them," was held bound by the affirmative reply of the carman.⁶

§ 760A.⁷ It of necessity follows that where a person refers to another, who thereupon makes a statement *in his presence*, proof of such statement is undoubtedly good evidence.⁸ Whether the answer of a person thus referred to is *conclusive* against the party seems, however, not to have been finally settled. As a general rule it ought to be held that a party who refers to another is conclusively bound by that other's decision; for to make a proposition to be bound by what another may say, and after he has spoken to recede from it, is not only dishonest, but might be turned to

¹ Gr. Ev. § 181, in part.

² See *Coole v. Braham*, 1848.

³ *Hoare v. Coryton*, 1812; *Robson v. Kemp*, 1803; *Watts v. Thorpe*, 1808; *Smallcombe v. Bruges*, 1824; *Taylor v. Kinloch*, 1819. These cases virtually overrule *Downton v. Cross*, 1794. See, also, *Bernasconi v. Farebrother*, 1832. Of course, even such admissions are still evidence against

the bankrupt himself: *Jarrett v. Leonard*, 1814.

⁴ Gr. Ev. § 182, almost verbatim.

⁵ *Williams v. Innes*, 1808 (Ld. Ellenborough).

⁶ *Daniel v. Pitt*, 1808; *Brock v. Kent*, 1807; *Burt v. Palmer*, 1803; *Hood v. Reeve*, 1828.

⁷ Gr. Ev. § 104, in great part.

⁸ *R. v. Mallory*, 1884, C. C. R.

very improper purposes, such as to entrap a witness, or to find out how far the party's evidence would go in support of his case.¹ In such cases the purposes of justice and policy are sufficiently answered, by (as in the case of any award) throwing the burthen of proof on the party questioning the decision, and holding him bound, unless he can impeach the test referred to by clear proof of fraud or mistake.²

§ 761. These principles apply whether the question referred be one of law or of fact; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject; and whatever the nature of the action in which the statements of the referee are proposed to be adduced in evidence. Accordingly, where two parties agreed to abide by the opinion of counsel upon the construction of a statute, the party against whose interest the opinion operated was held bound thereby;³ and a disputed fact regarding a mine, having been referred by consent to a miners' jury, their decision was afterwards received in evidence.⁴

§ 762. A tenant may even dispute his landlord's title if such landlord having to his knowledge agreed with a third person to leave it to counsel's opinion to say who is entitled to the demised property, counsel has decided that the third person is entitled, and the tenant has accordingly attorned to such third person.⁵

§ 763. To render the declarations of a person referred to admissible it is not necessary that the reference should have been made by express words; but it will suffice if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. For instance, if a party, questioned by means of an interpreter,

¹ Per *Ld. Kenyon*, in *Stevens v. Thacker*, 1793; *Lloyd v. Willan*, 1794; *Bretton v. Prettiman*, 1666; *Delesline v. Greenland*, 1795 (Am.), where the oath of a third person was referred to. But in *Garnet v. Balls*, 1822, on a question whether a horse in defendant's possession was identical with one lost by plaintiff, the plaintiff having said that if the defendant would take his oath that the horse was his, he should keep him; and he having made oath accordingly; Lord Tenterden observed, that, considering the loose manner in which the evidence had been given,

he would not receive it as conclusive, though it was a circumstance on which he should not fail to remark to the jury.

² *Whitehead v. Tattersall*, 1834.

³ *Price v. Hollis*, 1813. See, also, *Downs v. Cooper*, 1841.

⁴ *Sybray v. White*, 1836.

⁵ *Downs v. Cooper*, 1824. In such cases as the above, if the decision be written, and do not contain any recital of the agreements, it does not on the face of it purport to be an award, and is accordingly admissible in evidence without being stamped as such. See cases previously cited.

give answers through the same medium, the language of the interpreter is considered as that of the party; and may, consequently, be proved by any person who heard it, without calling the interpreter himself;¹ if a party, on motion before a judge, use the affidavit of another person to prove a certain fact deposed to therein, such affidavit is, on any subsequent trial, evidence as against him of this fact, and that, too, though the person who made the affidavit is present in court;² and where a petitioning creditor, knowing that his servant could prove a particular act of bankruptcy, sent him expressly for that purpose to be examined at the opening of the fiat, the depositions then made were held evidence of the act of bankruptcy as against the petitioning creditor on an issue as to that fact in a subsequent action between him and the representatives of the bankrupt's estate.³

§ 764-5. A party is not bound, however, by what his witness says at *Nisi Prius*.⁴

§ 766. It remains to consider the effect of *admissions by married women* when offered in evidence, either against herself or her trustees, or for or against her husband.

§ 766A. If a *wife sue or be sued as a single woman*, no valid reason can be given why her admissions should not have the same legal effect as *against* her as those of any other person.⁵

¹ *Fabrigas v. Mostyn*, 1776 (Gould, J.).

² *Brickell v. Hulse*, 1837; *Boileau v. Rutlin*, 1848; *Pritchard v. Bagshawe*, 1851; *Johnson v. Ward*, 1806 (Chambre, J.). But see *White v. Dowling*, 1845 (Ir.).

³ *Gardner v. Moulton*, 1839; *Boileau v. Rutlin*, 1848.

⁴ *Gardner v. Moulton*, 1839 (Ld. Denman and Patteson, J.); *Brickell v. Hulse*, 1837 (Ld. Denman and Coleridge, J.). See, also, ante, § 469. Yet, in one case (*Cole v. Headley*, 1840), in an action for trespass to a close, the deposition of a witness whom the plaintiff had called in a previous proceeding *before magistrates* for an alleged previous trespass to the same close, but who had then disproved plaintiff's possession of such close, was allowed to be read against the plaintiff. This was probably because the depositions were

secondary evidence of oral testimony (as to which see ante, § 464), the witness being abroad at the time, and the question previously disputed before the magistrates and that then being tried, being identical. Still, the case *may* possibly have been decided on the ground stated in § 763, though it is not the best ground on which to support it.

⁵ See *Walton v. Green*, showing that a woman's admission that she is married is inadequate to prove the fact *on her behalf*. In accordance with this principle, in *Wilson v. Mitchell*, 1813, where the defence to an action on contract was that the plaintiff was under coverture when the cause of action accrued, Lord Ellenborough is reported to have held—on what grounds it does not appear—that it was not sufficient to show that she had acknowledged herself to be married, without proof

§ 766B. Again, if the *trustees of a married woman sue or be sued*, and the opposite party be a stranger, the married woman's admissions will, like those of an ordinary cestui que trust,¹ be clearly admissible as against the trustees.

§ 766c. Where a wife and her husband have hostile interests, the wife's admissions ought to be received on his behalf to the same extent as her *vivâ voce* testimony;² for the principle of policy which admits the one should equally admit the other. Thus, in an action against a husband by the trustees of his wife under a separation deed for arrears of maintenance, the defence to which is adultery by the wife, proof of her admission of criminal misconduct ought, it is submitted,—contrary to what was formerly the law,—to now be received.³

§ 767. The admissions of a wife cannot, however, be received in evidence *for her husband* in any suit between him and a stranger, unless, perhaps, in the single event of their constituting part of the *res gestæ*.⁴

§ 768-9. In connection with this subject of how far a wife's admissions are evidence for her husband, it should be pointed out that in the Divorce Division of the High Court⁵ a person's confession or admission is only evidence against that person himself. As against that person such confession or admission may be acted upon *even though there be no other evidence*; but it is not evidence against anyone else. Consequently, a wife's confession of having committed adultery with him is no evidence against a co-respondent, nor is a co-respondent's admission to this effect evidence against a wife.⁶ Nevertheless, a wife's confession may be acted upon if the co-respondent admits the adultery, as he thereby makes an

of an actual marriage, or at least of cohabitation.

¹ See ante, § 756.

² See 16 & 17 V. c. 83.

³ *Scholey v. Goodman*, 1823.

⁴ See *Walton v. Green*, 1825 (*Abbott, C.J.*). In the case cited, in an action against a husband for goods supplied, the defence being that the wife had committed adultery, the wife's confession of it was, indeed, admitted as evidence for the husband as part of the *res gestæ*. But that case is, as a whole, nevertheless

submitted to be clearly bad law, since in such cases the real question is whether the wife had, in fact, committed adultery—not whether the husband had so reasonably suspected her of it that it had justified him in turning her out of doors (as he there had done).

⁵ The Act of 20 & 21 V. c. 85 (“The Matrimonial Causes Act, 1857”), and the Rules which regulate the practice of the court, are alike silent on this subject.

⁶ *Williams v. Williams*, 1866.

admission against interest.¹ But as the unfettered reception of such evidence might "open a wide door," the court looks with jealousy at confessions. The *weight* of the evidence in such cases is for the court, or for a jury if there be one.² Accordingly, following the old practice of the House of Lords' Committees, which existed when divorces were only obtainable by private Act of Parliament, and of the Ecclesiastical Courts, the present Divorce Court requires *corroboration* of a confession. It has been said that "corroboration" is the proof of some fact leading to the supposition that a witness has sworn truly upon the matter as to which he has given evidence.³ In other words, "corroboration" is the proof of facts ejusdem generis with those deposed to by the witness.⁴ The House of Lords, in proceedings upon *bills of divorce*, was in the habit of rejecting letters from the wife to the husband containing confessions of adultery,⁵ unless they were offered in mere confirmation of circumstances which tended strongly to prove the defendant's guilt.⁶ Under these circumstances, however, such letters, if addressed to a stranger, or even to the husband's agent, were receivable in evidence, after proof that they were not written in consequence of any threat or promise, and that the writer was then living apart from her husband;⁷ and the wife's oral confession of guilt to a third party was also admissible under like circumstances.⁸ Not only, however, were direct confessions rejected in the House of Lords, except under the circumstances above stated, but all letters written by the wife after her separation, either to the husband or to the adulterer, were generally held inadmissible, unless they were connected with some particular fact,⁹ or could be referred to as part of the *res gestæ*,¹⁰ or were tendered in evidence after a *primâ facie* case of guilt had been already established.¹¹ In the *Ecclesiastical Courts*,

¹ *Le Marchant v. Le Marchant*; H. L. 1876.

² *Williams v. Williams*, 1798.

³ *Boulton's case*, 1835 (Ir.).

⁴ *Simmons v. Simmons*, 1847.

⁵ *Ld. Cloncurry's case*, 1811, H. L.

⁶ *Doyly's case*, 1830.

⁷ *Ld. Cloncurry's case*, 1811, H. L.

⁸ *Ld. Ellenborough's case*, 1830, H. L. But see *Wiseman's case*, 1824,

H. L.

⁹ *Dundas's case*, 1814, H. L.

¹⁰ *Boydell's case*, 1830, H. L.

¹¹ *Robinson v. Robinson*, 1838. In one case, where the husband held a situation at Malta, and his wife, in consequence of bad health, had left the island, and had resided in England for several years, during which time she had lived with a

moreover, also formerly (and till they were abolished) the practice was similar to that of the House of Lords. A canon of 1603¹ rendered a mere confession, unaccompanied by other circumstances, insufficient to support a prayer for a separation *a mensâ et thoro*. This rule was there held applicable, though the confession was made under the apprehension of approaching dissolution, and was free from all suspicion of a collusive purpose.² Nevertheless a confession was always admissible in evidence, and, if coupled with other facts of a suspicious nature, generally proved an important ingredient in the decision of the court.³ It was never settled in these courts, however, whether a wife's confession of adultery would be sufficient in itself to repel a suit instituted by her for restitution of conjugal rights.⁴ They had, however, decided that in a suit asking for a decree of nullity of marriage, by reason of a former marriage, the defendant's simple admission of such former marriage was not sufficient.⁵

§ 770.⁶ It remains to be considered how far the *admissions of the wife* will *bind* the husband. Generally such admissions only bind him where the wife had authority to make them.⁷ Such authority does not result, by operation of law, from the mere relation of husband and wife. It is a question of fact, to be found by the jury, as in other cases of agency. For, though the relation of

paramour and had borne him four children, the House of Lords admitted a series of letters from the wife to her husband, which were tendered as accounting for the circumstance of her not going out to rejoin him, and as showing that she had practised upon him the grossest deceit: *Miller's case*, 1817.

¹ No. 105.

² *Mortimer v. Mortimer*, 1820.

³ In one case, letters from the wife to the supposed paramour, taken in conjunction with other suspicious circumstances, were, in the absence of direct proof, even considered to establish her guilt, though they contained no express avowal of adultery, and though they never reached the hands of the party to whom they were addressed, as they were intercepted by the husband: *Grant v. Grant*, 1839; *Caton v. Caton*, 1849;

Faussett v. Faussett, 1849. In the Ecclesiastical Courts, letters from the alleged paramour, found in the wife's possession, were admissible; but if they did not necessarily imply the commission of adultery, or were not supported by other evidence of indecent familiarities, they were insufficient to support a sentence of separation: *Hamerton v. Hamerton*, 1828. As to the admissibility of letters written by the adulterer to the wife, in proceedings before the H. of L., see *Ld. Glerawley's case*, 1821, H. L.

⁴ *Mortimer v. Mortimer*, 1820; *Burgess v. Burgess*, 1817.

⁵ *Searle v. Price*, 1816.

⁶ Gr. Ev. § 185, in great part.

⁷ *Emerson v. Blonden*, 1794; *Anderson v. Sanderson*, 1817; *Carey v. Adkins*, 1814; *Meredith v. Footner*, 1843.

husband and wife is peculiar in its circumstances, from its close intimacy and its very nature, yet there is nothing peculiar in the principles of law which apply to it. The wife is, indeed, seldom expressly constituted the agent of the husband, and the cases, consequently, almost universally, turn upon the question of implied authority, resulting from the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question.¹

§ 771. The inference of the wife's agency to contract or to make admissions from circumstances, used to be left to the jury with great latitude. For instance, they were once allowed to infer authority in the wife to accept a notice and direction, in regard to a particular transaction in her husband's trade, from her being seen twice in his counting-house appearing to conduct his business relating to that transaction, and once giving orders to the foreman;² and in an action against a husband for goods furnished to the wife while in the country, where he occasionally visited her, her letter to the plaintiff, admitting the debt, and apologizing for the non-payment, though written several years after the transaction, was held, previously to Lord Tenterden's Act,³ sufficient to take the case out of the Statute of Limitations.⁴ But of later years, however, greater strictness has prevailed. Indeed, where a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, admissions made by

¹ See ante, § 192. For instance, where, under the old law (a married woman may now sue for wages in her own name, 45 & 46 V. c. 75, §§ 1, 2), the husband sued for her wages, the mere fact that she had earned them did not authorise her to bind him by her admissions of payment (*Hall v. Hill*, 1757); nor could her unauthorised declarations affect him, even where he sued with her in her right; for in these, and similar cases, the right was his own, though acquired through her instrumentality. *Alban v. Pritchett*, 1796; *Kelly v. Small*, 1799; *Denn v. White*, 1797, as to the wife's admission of a trespass. Neither are the husband's admissions as to facts respecting his

wife's property, which happened before the marriage, receivable after his death to affect the rights of the surviving wife: *Smith v. Scudder*, 1824 (Am.).

² *Plimmer v. Sells*, 1834.

³ 9 G. 4, c. 14, § 1, which required that an acknowledgment, to take the case out of the statute, should be in writing, "signed by the party chargeable thereby." It may now be signed by an authorised agent: 19 & 20 V. c. 97, § 13, cited ante, § 745. See post, § 1073.

⁴ *Gregory v. Parker*, 1808 (Ld. Ellenborough); *Palethorpe v. Furnish*, 1783; *Clifford v. Burton*, 1829; *Petty v. Anderson*, 1825; *Cotes v. Davis*, 1808.

her to the landlord of the shop respecting the amount of rent were held not admissible to bind the husband.¹

§ 772.² The admissions of *solicitors* bind their clients in all matters relating to the progress and trial of the action. Sometimes they are even conclusive, and may be given in evidence upon a new trial, notwithstanding that, previously to such trial, the party has given notice that he intends to withdraw them, or though, where the alterations do not relate to the admissions,³ the pleadings have been altered. To have this effect, however, the admissions must have been distinct and formal, or such as are termed solemn admissions, made for the express purpose of relaxing the stringency of some rule of practice, or of dispensing with the formal proof of some document or fact at the trial.⁴

§ 773. Admissions made by solicitors, not indeed with the express intent of dispensing with proof of certain facts, but as it were *incidentally*, while they are referring to other matters connected with the action (which are generally the result of carelessness), are not regarded as conclusive admissions. But they, nevertheless, frequently raise an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove. Consequently, it is very important that solicitors should exercise great caution in the language they employ while corresponding with their opponents. For example, where in an action against the acceptor of a bill, defendant's solicitor served on the plaintiff a Notice to Produce, which contained a description of the bill corresponding with that set forth in the declaration, and then went on to say—"which said bill *was accepted by the said defendant*,"—such Notice was held *prima facie* evidence of the defendant's acceptance;⁵ in an action against the owners of a ship, their joint ownership was inferred from an undertaking to appear for

¹ *Meredith v. Footner*, 1843. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband, did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it.

² Gr. Ev. § 186, in part.

³ *Elton v. Larkins*, 1832 (Tindal, C.J.); *Doe v. Bird*, 1835 (Id. Denman); *Langley v. Id. Oxford*, 1836. See *Hargrave v. Hargrave*, 1850, as to the case where the client is an infant.

⁴ See cases cited in last note. Also, ante, § 724A, et seq.; and *Young v. Wright*, 1807; *Doe v. Rollings*, 1847.

⁵ *Holt v. Squire*, 1825 (Abbott, C.J.).

them, signed by their solicitor, in which they were described as owners of the sloop in question; ¹ and where, in an action of debt on a bond, the defendant's solicitor had admitted the signature of the attesting witness, this was held to amount by implication to an admission of the due execution of the instrument. ²

§ 774.³ Admissions contained in the *mere conversation* of a solicitor, cannot, however, be received against a client, though they relate to the facts in controversy. The reason of this distinction is that a solicitor is merely given authority to manage the action in court, and to do nothing more. ⁴ And a letter sent to the opposite party by a solicitor, expressed to be written "*without prejudice*," cannot be received as an admission, nor looked at on a question of costs; ⁵ neither can the reply be admitted, though not guarded in a similar manner. ⁶ However, an admission made before suit will be binding, if it be shown that the solicitor was already retained in the action, ⁷ though in the absence of any evidence of such retainer, some other proof must be given of authority to make the admission. ⁸ When the solicitor is retained in a cause, admissions made by his managing clerk, or his agent, are received as his own. ⁹

§ 783. Admissions made by *counsel* stand on much the same footing as those by solicitors. Therefore, where a special case had been signed by the junior on each side, on a subsequent new trial, the production of the case was regarded as containing admissions by the parties of the facts therein stated. ¹⁰ As a general proposition indeed, both in the Chancery and Common Law Divisions of the High Court, a consent once given, or an admission once made, by

¹ *Marshall v. Cliff*, 1815 (Ld. Ellenborough).

² *Milward v. Temple*, 1808 (Ld. Ellenborough).

³ Gr. Ev. § 186, in part.

⁴ *Petch v. Lyon*, 1846; *Young v. Wright*, 1807; *Parkins v. Hawkshaw*, 1817; *Doe v. Richards*, 1845. See *Wilson v. Turner*, 1808; *Watson v. King*, 1846.

⁵ *Walker v. Wiltshire*, *infra*.

⁶ *Paddock v. Forrester*, 1842; *Hoghton v. Hoghton*, 1852. See *Jardine v. Sheridan*, 1846; *Williams v. Thomas*, 1862; *Kurtz v. Spence*, 1888; *Walker v. Wiltshire*, 1889,

C. A.; and post, § 795.

⁷ *Marshall v. Cliff*, 1815 (Ld. Ellenborough); *Gainsford v. Grammar*, 1809.

⁸ *Wagstaff v. Wilson*, 1832; *Burg-hart v. Angerstein*, 1834 (Alderson, B.); *Pope v. Andrews*, 1840 (Coleridge, J.).

⁹ *Taylor v. Willans*, 1831; *Stand-age v. Creighton*, 1832; *Griffiths v. Williams*, 1787; *Truslove v. Burton*, 1824; *Taylor v. Forster*, 1825.

¹⁰ *Van Wart v. Wolley*, 1823 (Abbott, C.J.); *Edmunds v. Newman*, 1823.

counsel under his signature, with the authority of his client, with a full knowledge of the facts, and without some egregious mistake, is conclusively binding, and cannot afterwards be withdrawn;¹ and, after an admission has been made as to a fact, it is wrong to receive any evidence on the matter.² Moreover, where counsel on both sides so conduct a cause as to lead to an inference that a certain fact is admitted between them, the court or the jury may treat it as proved;³ and though the counsel only assumed it with respect to one issue, the fact may be taken for granted for all purposes, and as to the whole case.⁴ Accordingly, where plaintiff's counsel in his opening stated that his client had paid a particular cheque, but called no evidence in support of that fact, defendant was, after notice to produce, allowed to give secondary evidence of the contents of the cheque, without giving further proof of the plaintiff's possession, since if plaintiff had paid it he would get possession of it.⁵

§ 784. Where, however, on a second trial of a case, a party, having endeavoured to avoid part of his opponent's demand, by proving a mere statement made on the former trial, in his opponent's presence, by his counsel in his address, the judge rejected evidence of what had been then said.⁶ It may be urged, in support of the above ruling, that statements made by counsel in the course of his address to the jury are often no other than embellishments of the imagination or suggestions prompted by his own ingenuity; and that as even bills in equity were formerly so regarded, and consequently were not evidence against the parties who filed them, much less ought parties to be bound by mere oral speeches of counsel, which the client has not even had the advantage of considering before they are delivered.⁷

¹ *Harvey v. Croydon Union, &c.*, 1884, C. A.

² *Urquhart v. Butterfield*, 1888, C. A.

³ *Stracy v. Blake*, 1836; *Doe d. Child v. Roe*, 1852.

⁴ *Bolton v. Sherman*, 1837 (Ld. Abinger).

⁵ *Duncombe v. Daniell*, 1837 (Ld. Denman). But see *Machell v. Ellis*, 1845.

⁶ *Colledge v. Horn*, 1825. The court in this case subsequently granted a further new trial on other grounds,

the other members of it expressing no opinion as to the propriety of the course taken at the second trial, though Burrough, J., said that if the plaintiff was in court, and heard what his counsel said, and made no objection, he was bound by the statement. See *R. v. Coyle*, 1855; *Haller v. Worman*, 1860 (Keating, J.) Sed qu. as to this last case.

⁷ As to the authority of counsel to bind a client by a compromise or agreement made at the trial, see *Swinfen v. Swinfen*, 1857; *Chambers*

§ 785.¹ The admissions of a *principal* can sometimes (though only seldom) be received as evidence in an action *against the surety* upon his collateral undertaking. In such cases if the declarations of the principal were so made during the transaction of the business for which the surety was bound, as to become part of the *res gestæ*, they as such are admissible; but in any other event they are not.² For instance, where a surety has guaranteed payment for such goods as the plaintiffs should send to another in the way of trade, admissions by the principal debtor, made after the time of their supposed delivery, that he had received certain goods, are not any evidence against the surety;³ neither are confessions of embezzlement made by the clerk or collector after his dismissal evidence against a man who became a surety for the faithful conduct of such clerk or collector in his office.⁴

§ 786.⁵ The declarations of a principal may, in some cases, though rarely, be evidence against the surety. For instance, entries made by the principal debtor in the course of his duty, or whereby he has charged himself with the receipt of money, will, certainly, after his death,⁶ and probably after he has absconded,⁷ be received as evidence against the surety. Possibly, too, they are so if the defaulter be sued for his default, and thereupon gives his surety *notice of the pendency* of the suit upon which the surety requests him to defend it. In such a case judgment against the defaulter is conclusive evidence for the surety in a subsequent action by him against his principal (*i. e.*, the defaulter) for indemnity, inasmuch as the principal has thus *virtually become* a party to

v. Mason, 1858; *Swinfen v. Ld. Chelmsford*, 1860; *Prestwich v. Poley*, 1865; *Strauss v. Francis*, 1866; *Brady v. Curran*, 1868 (Ir.); *Holt v. Jesse*, 1876; *Davis v. Davis*, 1880.

¹ Gr. Ev. § 187, in great part.

² So, in the absence of special agreement, a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him if he be sued by the creditor: *Ex p. Young, re Kitchen*, 1881.

³ *Evans v. Beattie*, 1803 (Ld. Ellenborough); *Bacon v. Chesney*, 1816 (id.); *Longenecker v. Hyde*, 1813

(Am.).

⁴ *Smith v. Whittingham*, 1833. See, also, *Cutler v. Newlin*, 1819 (Holroyd, J.); *Dunn v. Slee*, 1816; *Dawes v. Shed*, 1818 (Am.); *Foxcroft v. Nevens*, 1826 (Am.); *Hayes v. Seaver*, 1831 (Am.); *Beall v. Back*, 1794.

⁵ Gr. Ev. § 168, in part.

⁶ *Whitnash v. George*, 1828; *Middleton v. Melton*, 1829; *Goss v. Watlington*, 1821; *M'Gahey v. Alston*, 1836.

⁷ *Abbeyleix Gdns. v. Sutcliffe*, 1890 (Ir.) (diss. O'Brien, J.); *Town of Union v. Bermes*, 1882 (Am.).

the suit. Accordingly, in an action by the sheriff against the surety of a bailiff, who had kept back money, a written admission by the bailiff of the receipt of this money was under these circumstances held to be evidence against the surety, the bailiff being considered as substantially the defendant in the action.¹

§ 787.² The admissions of a person are also evidence against any other who is *in privity* with him. The term *privity* denotes mutual or successive relationship to the same rights of property; and privies are distributed in several classes, according to the manner of this relationship. Thus, there are privies in estate,—as, donor and donee, lessor and lessee, joint-tenants, and successive bishops, rectors, and vicars; privies in blood,—as, heir and ancestor, and coparceners; privies in representation,—as, executors and testators, administrators and intestates; privies in law,—where the law, without privity of blood or estate, takes the land from one and bestows it upon another, as by escheat. All these are more generally classed into privies in estate, privies in blood, and privies in law.³ The ground, upon which admissions bind those in privity with the party making them, is, that they are identified in interest; and of course the rule extends no further than this identity. The cases of coparceners, and of joint-tenants, are assimilated to those of joint promissors, partners, and others having a joint interest, which have already been considered.⁴ In other cases, where the party by his admissions has qualified his own right, and another claims to succeed him, as heir, executor, or the like, the latter succeeds only to the right as thus qualified at the time when his title commenced; and the admissions are receivable in evidence against the representative, in the same manner as they would have been against the party represented.⁵ Thus, the declarations of the ancestor, that he held the land as tenant of a third person, are

¹ *Perchard v. Tindall*, 1795 (Ld. Kenyon). The ground above suggested is in accordance with the ruling, and appears to be the only way in which it can be supported. A document saying, “discharge the defendant out of custody; I have received the money,” signed by the bailiff, was there held to be for stamp purposes an authority, not a receipt, but sufficient to charge the witness

(the bailiff) with the receipt of the money.

² Gr. Ev. § 189, in great part.

³ Co. Lit. 271 a; *Carver v. Jackson*, 1830 (Am.); Wood, Inst. J.L. Eng. 236; Tomlin, L. Dict. Verb. *Privies*. See Walker’s case, 1586; Beverley’s case, 1603-4; ante, § 90.

⁴ Ante, § 743.

⁵ *Coole v. Braham*, 1848 (Parke, B.).

admissible to show that person's seisin in an action by him against the heir for the land;¹ and the declarations of an intestate are admissible against his administrator, or any other claiming in his right.²

§ 788.³ On the same principle, any declaration by a landlord, in a prior lease concerning the estate, is evidence against a lessee, who claims by a subsequent title;⁴ admissions—whether evidenced by writing,⁵ such as letters, receipts, cases drawn for the opinion of counsel, answers in Chancery, or verbal statements, or even by conduct,⁶—made by former bishops, rectors, or vicars, with regard to their several rights, will be evidence against their respective successors, in all cases where the same rights are in question. Ancient maps, books of survey, and the like, though mere private documents, are frequently admissible on the ground that a privy in estate exists between the former proprietor under whose direction they were made, and the present claimant against whom they are offered;⁷ and the declarations of former owners or occupiers, made while in possession, are admitted against those claiming in privy of estate as evidence of the nature and extent of their title.⁸

§ 789. In general, the naked declarations of a tenant will not be evidence against the reversioner.⁹ Accordingly, the declarations of

¹ *Doe v. Pettett*, 1821; 2 *Poth.*, Obl., 254; ante, §§ 684—687, and cases there cited.

² *Smith v. Smith*, 1836. But the declarations of an executor, though made while he was acting in that capacity, are not admissible against a special administrator, who has been appointed in consequence of the executor's protracted absence from England: *Rush v. Peacock*, 1838 (*Ld. Denman*). There the administrator was appointed under 38 G. 3, c. 87. As to how far payments made by an executor *de son tort* to a creditor of a deceased person are binding on the rightful executor, see *Thomson v. Harding*, 1853.

³ *Gr. Ev.* § 189, in part.

⁴ *Crease v. Barrett*, 1835. See *Doe v. Seaton*, 1834.

⁵ *Bp. of Meath v. M. of Winchester*, 1836; *Maddison v. Nuttall*, 1829; *Doe v. Cole*, 1834 (*Patteson, J.*); *De Whelpdale v. Milburn*, 1818; *Carr v.*

Mostyn, 1850.

⁶ See *Lady Dartmouth v. Roberts*, 1812, where a vicar who had filed a bill against his rector and certain landowners of the parish for tithe hay, having abandoned the suit after the defendants in their answer had declared that the tithes in question belonged to the rector, in a subsequent action for similar tithes brought by a succeeding rector against owners, who had purchased their lands from the parties to the former suit, the answer was held to be strong evidence in favour of the plaintiff.

⁷ *Bridgman v. Jennings*, 1699.

⁸ *Woolway v. Rowe*, 1834; *Doe v. Austin*, 1832; *Davies v. Pierce*, 1787; *Doe v. Jones*, 1808; *Jackson v. Bard*, 1809 (*Am.*); *Norton v. Pettibone*, 1829 (*Am.*); *Weidman v. Kohr*, 1818 (*Am.*).

⁹ *Tickle v. Brown*, 1835 (*Patteson J.*).

a former occupier of the defendant's land were held not to be admissible against him, on an issue whether the plaintiff had an easement in such land.¹ But in an action for the recovery of land the admission of the tenant in possession will, from the peculiar nature of the proceedings, be evidence against one who defends as landlord.² And in one case the receipts of a lessee of vicarial tithes were held at *Nisi Prius* to be evidence, in proof of a *modus*, against the vicar, by reason of privity between them.³

§ 790.⁴ In consequence of privity of estate between them, admissions *made by the assignor* of a personal contract or chattel previous to the assignment, where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer, bind such assignee. This, however, occurs only where an identity of interest exists between the assignor and assignee. Such identity is deemed to exist both when the assignee is either expressly or impliedly the mere agent and representative of the assignor,⁵ and also whenever the assignee has acquired a title with actual notice of the true state of that of the assignor as qualified by the admissions in question, or where he has purchased a demand already stale, or otherwise infected with circumstances of suspicion.

§ 791.⁶ Accordingly, in an action by the indorsee of a bill or note, which has been taken by the plaintiff either after it was due, or with notice of fraud in its original concoction and without consideration, the declarations of the indorser made while the interest was in him, are admissible in evidence for the defendant.⁷ But as "the right of a person holding by a good title is not to be cut down by the acknowledgment that he had no title," therefore the declarations of a *former* holder of a note, that such note was given without consideration, even though made while he held the note, are not

¹ *Scholes v. Chadwick*, 1843 (Cresswell, J.); *Papendick v. Bridgwater*, 1855.

² *Doe v. Litherland*, 1836. See R. S. C. 1883, Ord. XII. rr. 25, 26.

³ *Jones v. Carrington*, 1824 (Park, J.). See, also, *Illingworth v. Leigh*, 1800.

⁴ Gr. Ev. § 190, almost verbatim.

⁵ *Welstead v. Levý*, 1831; *Harri-*

son v. Vallance, 1822; *Gibblehouse v. Strong*, 1832 (Am.); *Hatch v. Dennis*, 1833 (Am.); *Snelgrove v. Martin*, 1822 (Am.).

⁶ Gr. Ev. § 190, in part.

⁷ *Beauchamp v. Parry*, 1830; *Peckham v. Potter*, 1824 (Ld. Gifford); *Benson v. Marshal* (undated), cited in *Shaw v. Broom*, 1824; *Shirley v. Todd*, 1832 (Am.).

admissible against an indorsee, to whom the instrument has been transferred for good consideration, and before it was overdue; because such an indorsee derives his title from the nature of the instrument itself, and not through the previous holder.¹

§ 792. The principle that declarations by a person through whom the plaintiff claims are admissible is further illustrated by a case² in which an action was brought for taking three mares, and the defendant justified as lord of the manor under a heriot custom; the sole question between the parties being whether the tenant was possessed of the mares at the time of her death. Her declarations that she had given them to the plaintiff some time before were held admissible, as they were against her interest, and the right of the lord depended upon her title. Where, however, the issue does not distinctly raise the question whether the title of the party against whom declarations are tendered is dependent upon that possessed by the declarant, such declarations will be inadmissible. Therefore, where an issue was directed to try whether goods seized in A.'s house at the suit of the defendant *were the property of the plaintiff*, the declarations of A. respecting the property were rejected.³ Had the issue raised the question, whether *at the time of the execution* the goods belonged to A., it would seem, on principle, that declarations of A. made before the seizure would have been evidence against the execution creditor (since, in an interpleader suit, the execution creditor ought to be considered as claiming under the debtor) when they *qualified* or *affected* the debtor's title to the chattels in question.⁴ In accord-

¹ Woolway v. Rowe, 1834, explaining Barough v. White, 1825; Smith v. De Wruit, 1825 (Abbott, C.J.); Beauchamp v. Parry, 1830. In applying the principle indicated in the text, a note payable on demand, though not negotiated for some time after its date, will not on that account be treated as a note taken by an indorsee when overdue; for such notes are intended to be continuing securities, and may circulate for years without exciting suspicion: Barough v. White, 1825; Brooks v. Mitchell, 1841. Neither will the circumstance that the declarations of the prior

holder would, if received, prove his fraud in connection with the indorsee, render them admissible against the latter; because all preliminary facts, which are necessary to establish the admissibility of evidence, must be proved aliunde, before such evidence is received: Phillips v. Cole, 1839. See Heenan v. Clements, 1850 (Ir.).

² Ivat v. Finch, 1808.

³ Stotherd v. James, 1843 (Maule, J.).

⁴ Coole v. Braham, 1848. In this case a decision of Mr. Justice Wightman (in Prosser v. Gwillim, 1843),

ance with this view, on an interpleader issue between the holder of a bill of sale and an execution creditor, where the question was the usual one of fraud in the concoction of the bill of sale, the plaintiff was not allowed to support the genuineness of the instrument by giving evidence of an admission by the execution debtor that a debt was due from him to the plaintiff, though such admission was made prior to the assignment, and also in the absence of the defendant.

§ 793.¹ These admissions by third persons, through whom the person against whom they are received claims, as they derive their legal force from the relation of the party making them to the property in question, may be *proved by any witness* who heard them, without calling the party by whom they were made. The question merely is, whether the admission alleged was made, and not whether the fact is as then admitted. The truth of it may, where the admission is not conclusive,—and it seldom is so,—be controverted by other testimony, and even by calling the party himself; but it is not necessary to produce him, for his declarations, when admissible at all, will be received as original evidence, and not as hearsay.²

§ 794. With respect to *the time and circumstances* of the admission, it may first be observed, that whenever the declarations of a third person are offered in evidence, on the ground that the party against whom they are tendered derives his title from the declarant, it must be shown that they were made at a time when he had an interest in the property in question. For it would be manifestly unjust that a person, after having parted with his interest in property, should be empowered to divest the right of another claiming under him, by any statement which he may choose to make.³ Accordingly, the admission of a former party to a bill of exchange, made after he has negotiated it, cannot under any circumstances be received against the holder;⁴ where a person had,

rejecting the declarations of the execution debtor, on the ground that the execution creditor claimed *adversely* to him, is discredited.

¹ Gr. Ev. 191, almost verbatim.

² Ante. §§ 576, 602, 603, and cases there cited; Woolway v. Rowe, 1834;

Brickell v. Hulse, 1837.

³ Doe v. Webber, 1834 (Ld. Denman); Foster v. M'Mahon, 1847 (Ir.); Lalor v. Lalor, 1879 (Ir.).

⁴ Pocock v. Billing, 1824; Shaw v. Broom, 1824. See Roberts v. Justice, 1843.

by a voluntary post-nuptial settlement, conveyed away his interest in an estate, and afterwards executed a mortgage of the same property, his admission that money had actually been advanced upon the mortgage was held not to be admissible on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void;¹ and the declaration² of a bankrupt, though good evidence to charge his estate with a debt if made before his bankruptcy, is not admissible at all if it were made afterwards.³ This most just and equitable doctrine will be found to apply to the cases of vendor and vendee, grantor and grantee, and, generally, to all cases of rights acquired in good faith previous to the time when the admission was made.⁴

§ 795. We have before briefly noticed,⁵ that *confidential overtures of pacification*, and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded. This is on grounds of public policy.⁶ If this were not so, it would often be difficult to take any steps towards an amicable compromise or adjustment. Lord Mansfield has observed that all men must be permitted to buy their peace, without prejudice to them should the offer not succeed; such offers being made to stop litigation, without regard to the question whether anything is due or not. If, therefore, a defendant, on being sued for 100*l.*, should offer the plaintiff 20*l.*, at the same time stating that he made such offer “without prejudice,” evidence of the offer would not be admissible in evidence; for it is irrelevant to the issue; it neither admits nor ascertains any debt, and is no more than saying that he would give 20*l.* to be rid of the action.⁷ An offer made “without prejudice” cannot be looked at even upon a question of costs.⁸

¹ Doe v. Webber, 1834; Gully v. Bp. of Exeter, 1828.

² Gr. Ev. § 180, in part.

³ Bateman v. Bailey, 1794; Smith v. Simmes, 1795; Deady v. Harrison, 1815. See, also, Harwood v. Keys, 1832; and Kempland v. Macauley, 1791 (Ld. Kenyon).

⁴ Welstead v. Levy, 1831; Bartlett v. Delprat, 1808 (Am.); Clark v. Waite, 1815 (Am.); Bridge v. Eggleston, 1817 (Am.); Phenix v. Ingraham, 1809 (Am.); Placker v. Gonsalus, 1815 (Am.); Patton v.

Goldsborough, 1822 (Am.); Babb v. Clemson, 1825 (Am.); Crowder v. Hopkins, 1843 (Am.); Padgett v. Lawrence, 1843 (Am.).

⁵ Ante, § 774.

⁶ Cory v. Bretton, 1830 (Tindal, C.J.); Healey v. Thatcher, 1838; Paddock v. Forrester, 1842; Jardine v. Sheridan, 1846; Whiffen v. Hardwright, 1848; Hoghton v. Hoghton, 1852; Jones v. Foxall, 1852.

⁷ B. N. P. 236, b.

⁸ Walker v. Wiltshire, 1889, C. A.

Even the giving of a small sum in order to obtain the release of a right, cannot be considered as an acknowledgment that a right exists; it amounts only to this—"I give you so much for not seeking to disturb me."¹ Perhaps, also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession,² will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appear to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected;³ though, in this case, if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the cause, it will be received.⁴ The American courts have held that evidence of the admission of any independent fact is receivable, though made during a treaty of compromise.⁵

§ 796. In the absence of any express, or strongly implied, restriction as to confidence, an offer of compromise is clearly admissible as *some* evidence of liability.⁶ The offer of a less sum than the amount demanded will not, in general, support a count on an account stated, since it may be a mere offer to purchase peace;⁷—nor, perhaps, will an offer by the drawer of a bill, who is threatened with legal proceedings upon it, to give another bill by way of settlement, obviate the necessity of proving at the trial that he has received due notice of dishonour.⁸ Nevertheless, there are occasions when the fact of an offer having been made may be entitled to considerable weight,⁹ as, for instance, if the drawer of a bill, whose signature is in issue, has proposed a settlement. On the other hand, in a case¹⁰ where the defendant was sued for keeping

¹ Underwood *v.* Ld. Courtown, 1804 (Ir.) (Ld. Redesdale).

² Thomson *v.* Austen, 1823 (Bayley, J.).

³ Walbridge *v.* Kennison, 1794 (Ld. Kenyon).

⁴ Id.

⁵ Mount *v.* Bogert, 1816 (Am.) (Thompson, C.J.); Murray *v.* Coster, 1825 (Am.); Fuller *v.* Hampton, 1824 (Am.); Sanborn *v.* Neilson,

1828 (Am.); Delogny *v.* Rentoul, 1812 (Am.).

⁶ Wallace *v.* Small, 1830 (Ld. Tenterden); Watts *v.* Lawson, 1830 (id.); Nicholson *v.* Smith, 1822 (id.).

⁷ Wayman *v.* Hilliard, 1830.

⁸ Cuming *v.* French, 1809 (Ld. Ellenborough). See post, § 806.

⁹ Harding *v.* Jones, 1835.

¹⁰ Thomas *v.* Morgan, 1835. See, however, Sayers *v.* Walsh, 1848 (Ir.).

mischievous dogs, which had killed three of the plaintiff's cattle, and it appeared that on being told of the injury done by his dogs he had offered to settle for it, the court held, that though this was a fact, which in strictness should have been submitted to the jury as evidence of the scienter,¹ it was entitled to little, if any, weight, "as it might have been made from motives of charity without any admission of liability at all." Admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual.²

§ 797. As to a man's purchasing peace, or endeavouring to do so, the words of Lord Ellenborough,—when Sir William Scott was sued for illegally excommunicating one Beaurain, whose animosity he had endeavoured to stifle by a gift,—are worth recalling, "Let this action be a lesson for all men to stand boldly forward—to stand on their characters—and not, by compromising a present difficulty, to accumulate imputations on their honour."³

§ 798.⁴ Admissions made under circumstances of *constraint*, cannot be received when obtained by *illegal* duress;⁵ but are admissible, at least on the trial of civil actions,⁶ if the compulsion under which they were made was legal. Thus affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken in bankruptcy, will be evidence against himself in a subsequent cause. They, under these circumstances, are admissible even though the subsequent opponent was a

¹ The absurd doctrine of "scienter," as applicable to mischievous dogs, no longer prevails in its entirety. In Ireland, "the owner of every dog is liable in damages for injury done to any *sheep* by his dog," whether such dog be mischievous or not: 25 & 26 V. c. 59 ("The Dogs (Ireland) Act, 1862"), § 1, Ir. See, also, 28 & 29 V. c. 50, Ir. A somewhat similar amendment of the law has been introduced into England and Scotland, and has been extended in these countries to injuries caused by dogs to *sheep or cattle*: 26 & 27 V. c. 100 ("The Dogs (Scotland) Act, 1863"), § 1, Sc.; 28 & 29 V. c. 60 ("The

Dogs Act, 1865"). The word "cattle" here used includes horses: *Wright v. Pearson*, 1869.

² *Gregory v. Howard*, 1800 (Ld. Kenyon); *Slack v. Buchannan*, 1790 (id.).

³ Ld. Eldon's *Life*, by Twiss, vol. ii. pp. 233—235, 2nd edit.

⁴ Gr. Ev. § 193, in part.

⁵ *Stockfleth v. De Tastet*, 1814 (Ld. Ellenborough); *Robson v. Alexander*, 1828. As to what questions a witness may refuse to answer, see post, §§ 1453 et seq.

⁶ As to their admissibility in *criminal* proceedings, see post, §§ 895—899.

stranger to the prior proceeding,¹—though the party who made the admission might, had he thought fit, have successfully demurred to the questions,²—or though the questions were irrelevant to the matter before the court at the time of the examination, and were put for the purpose of procuring evidence in another action depending against him,³—or though the witness had no opportunity of fully explaining the testimony he had given. For example, in an action⁴ for taking the plaintiff's ship, the testimony given by the defendant as a witness in an action between other parties, in which he admitted the taking of the ship, was allowed to be proved against him, though it appeared that when, in giving his evidence, he was proceeding to state his reasons for taking the ship, the judge had stopped him by saying that it was unnecessary for him to vindicate his conduct; and where a defendant had been examined in bankruptcy, and, though the whole of what he said had not been taken down, the portion that was reduced to writing had been read over and signed by him, such portion was held to be receivable against him as a statement of facts, the truth of which he had admitted.⁵

§ 799. An admission, obtained under a compulsory examination, may, it is submitted,⁶ be evidence of an *account stated*. If, for instance, an admission were contained in an answer to interrogatories, it would most probably be regarded as good evidence of an account stated.⁷

§ 800.⁸ Passing now to a consideration of the *nature* of admissions, it may be observed that no difference exists, in regard to their admissibility, between direct admissions, and those which are

¹ *Grant v. Jackson*, 1793 (Ld. Kenyon); *Ashmore v. Hardy*, 1836 (Patteson, J.).

² *Smith v. Beadnell*, 1807 (Ld. Ellenborough).

³ *Stockfleth v. De Tastet*, 1814. If an examination has been perverted to improper purposes, the remedy is by an application to have the examination taken from the files and cancelled (Ld. Ellenborough).

⁴ *Collett v. Ld. Keith*, 1803 (Le Blanc, J.).

⁵ *Milward v. Forbes*, 1803 (Ld. Ellenborough).

⁶ The contrary has been supposed, but the case in which this point arose probably rests on the ground that the admission was there made to a third party (*Tucker v. Barrow*, 1828 (Littledale, J.)), while to support an account stated the admission must be made, either to the person to whom the money is owing, or to someone sent by him: *Breckon v. Smith*, 1834; *Bates v. Townley*, 1848.

⁷ See *Bates v. Townley*, 1848 (Alderson, B.).

⁸ Gr. Ev. § 194, in part.

incidental, or made in some other connexion, or involved in the admission of some other fact. One or two illustrations of this have already been noticed while treating of admissions made by solicitors,¹ and the following may here be added. In an action by the assignees of a bankrupt against an auctioneer to recover the proceeds of a sale of the bankrupt's goods, the defendant's advertisement of the sale, describing the goods as "the property of D., a bankrupt," was held to be a conclusive admission that D. was a bankrupt, and that the defendant was acting under his assignees;² and a party who, with a view of making a trader a bankrupt, had made an affidavit that the trader owed him 100*l.*, and was become bankrupt, was not allowed to dispute the bankruptcy, when afterwards sued in trover by the assignees.³

§ 801.⁴ Admissions are sometimes *implied from the assumption or the recognition of a character*. Whenever the existence of any domestic, social, or official relation is in issue, any recognition, whether by word or deed, of that relation, is *prima facie* evidence of its existence, as against the person making such recognition.⁵ Thus, where one has *assumed to act in an official character*, this is an admission by him of his appointment or title to the office, so far as to render him liable, even criminally, for misconduct or neglect in such office.⁶ This doctrine has been applied, among other cases, in actions or prosecutions against clergymen, for non-residence;⁷ against military officers, for returning false musters;⁸ against popish priests, for remaining forty days within the kingdom, when this was considered an offence of no less magnitude than high treason;⁹ against letter-carriers, for embezzlement;¹⁰ and against solicitors,¹¹ toll-gatherers,¹² and collectors,¹³ for penalties.

¹ Ante, § 773.

² *Maltby v. Christie*, 1795, as explained (Ld. Ellenborough) in *Ran-kin v. Horner*, 1812.

³ *Ledbetter v. Salt*, 1828; *Harmer v. Davis*, 1817. See post, § 856, ad fin.

⁴ Gr. Ev. § 195, in part.

⁵ *Dickinson v. Coward*, 1818 (Ld. Ellenborough); recognized (Ld. Lyndhurst) in *Inglis v. Spence*, 1834.

⁶ See ante, § 171.

⁷ *Bevan v. Williams*, 1776 (Ld. Mansfield).

⁸ *R. v. Gardner*, 1810 (Ld. Ellenborough).

⁹ *R. v. Kerne*, 1679; *R. v. Brommich*, 1679; *R. v. Atkins*, 1679.

¹⁰ *R. v. Borrett*, 1833 (Littledale and Bosanquet, JJ.; Bolland, B.). The prisoner was indicted under 2 W. 4, c. 4, now repealed by 24 & 25 V. c. 95.

¹¹ *Cross v. Kaye*, 1796.

¹² *Trowbridge v. Baker*, 1823 (Am.).

¹³ *Lister v. Priestly*, 1810.

§ 802. Again, where a man has *recognised the official character of another*, by treating with him in such character or otherwise, this is at least *primâ facie* evidence of his title against the party thus recognising it.¹ For instance, where a person had obtained credit from the renter of turnpike tolls, and had afterwards accounted with him in that character, and made him a partial payment, he was not permitted to question the legality of his appointment;² where a farmer-general of post-horse duties brought an action for certain statute penalties against a person who let out horses for hire, proof of plaintiff's appointment was waived, the defendant having previously accounted with him as farmer-general;³ the clerk of the trustees of a turnpike road has been prevented from showing that a person who had acted as a trustee, and whom he had himself, while clerk, treated as such, was not duly qualified;⁴ in an action by the trustee of a bankrupt against a debtor, who has made him a partial payment,⁵ or has acknowledged his title in letters to the solicitor under the bankruptcy,⁶ the plaintiff need not prove his title as trustee, though notice to dispute it has been given; in an action by a solicitor for defamation, in charging him with swindling, and threatening to have him struck off the rolls, this threat was held to imply an admission that the plaintiff was a solicitor;⁷ and in a similar action by a physician, where the plaintiff was spoken of as "Doctor L.," and the defendant had, as an apothecary, made up medicines prescribed by him, the Court of Common Pleas was equally divided upon the question, whether the defendant's words and conduct amounted to an acknowledgment of the plaintiff's character.⁸ In actions of this kind, however, if the words complained of charge a *want* of qualification and not mere misconduct, the plaintiff must prove that he possesses the character which has been imputed.⁹

§ 803. Thus, in an action by a surgeon for work and labour,

¹ Peacock v. Harris, 1808.

² See ante, §§ 173—175.

³ Radford v. M'Intosh, 1790.

⁴ Pritchard v. Walker, 1827 (Vaughan, B.).

⁵ Dickinson v. Coward, 1818.

⁶ Inglis v. Spence, 1834; Crofton

v. Poole, 1830.

⁷ Berryman v. Wise, 1791.

⁸ Smith v. Taylor, 1805; Sir J. Mansfield and Heath, J., aff., Rooke and Chambre, JJ., neg.

⁹ Id.; Collins v. Carnegie, 1834 (Ld. Denman).

where¹ the defence was that the plaintiff was a physician, and therefore incapable, by the law then in force,^{1a} of maintaining an action for fees, it having been shown that the plaintiff had written prescriptions and signed himself M.D., Lord Ellenborough was on the point of nonsuiting him—saying that “if a person passes himself off as a physician, he must take the character cum onere”—when it appeared that the defendant had paid money into court; on this, his lordship thought that this act was tantamount to an admission of the plaintiff's right to sue as a surgeon, and got over the objection.

§ 804.² Admissions may (as has already been mentioned while treating of presumptions³) be implied from the *conduct* of the party. Thus, an attempt by a plaintiff to suborn false witnesses is cogent evidence that his cause is an unrighteous one;⁴ the suppression of documents is an admission that the contents were deemed unfavourable to the party suppressing them;⁵ the entry of a charge to a particular person in a tradesman's book, or the making out of a bill of parcels in his name, is an admission that the goods were furnished on his credit;⁶ the delivery, by a tradesman, of an invoice or account in which goods are described as bought from him, is strong, but not conclusive, evidence that he was the real vendor;⁷ the omission of a claim in a schedule of the debts due to the framer of it, which is given on oath, is an admission that such debt is not due;⁸ and payment of money is an admission against the payer, that the receiver is the proper person to receive it,—

¹ *Lipscombe v. Holmes*, 1810. See, further, on this subject, *R. v. Barnes*, 1816; *Cummin v. Smith*, 1816 (Am.); *Divoll v. Leadbetter*, 1826 (Am.).

^{1a} See now 21 & 22 V. c. 90, § 31; *Gibbon v. Budd*, 1863; and bye-law of the Royal College of Physicians, that no *Fellow* of the College shall be entitled to sue for fees. This bye-law, it will be observed, does not extend to ordinary *members* of the College, and such persons may now sue by virtue of the Medical Act.

² Gr. Ev. § 196, in part.

³ Ante, §§ 107, 116, 117, 178, 555.

⁴ *Moriarty v. Lond. Chat. & D. Rail. Co.*, 1870.

⁵ *James v. Biou*, and *Owen v.*

Flack, 1826; *Bell v. Frankis*, 1842; *Curlewis v. Corfield*, 1841; *Clifton v. U. S.*, 1846 (Am.); *R. v. Lond. Bright. & S. Coast Rail. Co.*, 1851 (*Coleridge, J.*); *Sutton v. Devonport*, 1857; *Edmonds v. Foster*, 1875.

⁶ *Storr v. Scott*, 1833 (*Ld. Lyndhurst*). See *Thomson v. Davenport*, 1829.

⁷ *Holding v. Elliott*, 1850. See post, § 1153.

⁸ In *Nicholls v. Downes*, 1830, *Ld. Tenterden* held it to be conclusive, apparently questioning *Hart v. Newman*, 1811, where *Ld. Ellenborough* treated it as entitled to little weight. See *Tilghman v. Fisher*, 1840 (Am.).

although not against the receiver, that the payer was the person who was bound to pay it; for the party receiving payment of a just demand may well assume, without inquiry, that the party tendering the money was the person legally bound to pay it.¹

§ 805. Admissions from conduct may also arise in settlement cases. Thus, relief given at various times to a pauper while he is residing in *another* parish, is cogent, though not conclusive, evidence that he is settled in the relieving parish.²

§ 806. Admissions by conduct also arise in actions connected with bills of exchange. Thus, a distinct promise by the drawer to pay, or indeed any acknowledgment by him of liability upon, a dishonoured bill,—as, for example, the suffering judgment by default in a prior action, brought by a former holder of the instrument,—will raise an inference that he has either received or waived due notice of dishonour,³ and, in the case of a foreign bill, that it has been duly protested;⁴ and a jury will be justified in coming to the same conclusion on less positive evidence; as, for instance, if the drawer, in disclaiming liability when threatened with an action, did not rest his defence on the want of notice, but on some different ground.⁵ The maxim, *expressum facit cessare*

¹ *James v. Biou*, 1826; *Chapman v. Beard*, 1797.

² *R. v. Barnsley*, 1813 (Ld. Ellenborough); *R. v. Wakefield*, 1804; *R. v. Stanley cum Wrenthorpe*, 1812; *R. v. East Winch*, 1840; *R. v. Yarwell*, 1829; *R. v. Carnarvonshire JJ.*, 1841. Formerly the relief must have been given by the churchwardens and overseers in order to furnish evidence against the parish, but the board of guardians now represent for this purpose every parish within the union (see *R. v. Crondall*, 1847); and the clerk to the guardians represents the board (*R. v. Wigan*, 1849). Even a single instance of such relief having been given will warrant a similar conclusion (*R. v. Edwinstowe*, 1828). Of course, the effect of such evidence will be much stronger if the examination states a distinct head of settlement in the relieving parish, though

the technical proof may fail to establish it satisfactorily (*R. v. Bedingham*, 1844 (Ld. Denman)). On the other hand, the relief of a pauper, while residing in *the relieving parish*, is no evidence whatever of a settlement, however frequently it may have been bestowed: *R. v. Chatham*, 1807; *R. v. Trowbridge*, 1827; *R. v. Coleorton*, 1830; *R. v. St. Giles-in-the-Fields*, 1844.

³ *Rabey v. Gilbert*, 1861; *Woods v. Dean*, 1862; *Cordery v. Colvin*, 1863; *Killby v. Rochussen*, 1865.

⁴ *Hicks v. D. of Beaufort*, 1838; *Campbell v. Webster*, 1845; *Patterson v. Becher*, 1821; *Brownell v. Bonney*, 1841; *Pardoe v. O'Connor*, 1848 (Ir.). See *Bell v. Frankis*, 1842; *Holmes v. Staines*, 1850.

⁵ *Wilkins v. Jadis*, 1831 (Ld. Tenterden); *Curlewis v. Corfield*, 1841. See ante, § 796.

tacitum, will here raise a presumption, which a defendant may find it difficult to rebut.

§ 807. Again: conduct may create a waiver of a determination of the relationship of landlord and tenant, which has previously been brought about by forfeiture, under the terms of the holding, or by notice to quit. Such determination is waived by the landlord's suing,¹ or distraining,² for rent accruing due since a forfeiture of which the lessor has had notice, as also by the acceptance of such rent,³ and perhaps by even the mere demand of it,⁴—unless, indeed, an action to recover the property has actually been brought previously.⁵ For these acts amount to an acknowledgment of the tenancy on the part of the lessor.⁶ If, however, a breach be a continuing one, as the using rooms in a prohibited manner, or the omitting to keep premises insured or repaired, the acceptance of rent after such breach will not waive the forfeiture incurred by subsequent user or omission.⁷ A notice to quit will also in general be regarded as waived, if the landlord *accepts* rent subsequently accruing due, or puts in a distress for *such* rent, or does any other act amounting to a recognition of an existing tenancy, after the expiration of the time when the tenant ought to have quitted according to the notice.⁸ Whether a simple *demand* of rent subsequently accruing due, or the bringing of an action for such rent, will operate as a waiver of a notice to quit, is a question not of law,

¹ *Roe v. Minshal*, 1759; *Dendy v. Nicholl*, 1858. See *Toleman v. Portbury*, 1872.

² *Doe v. Peck*, 1830; *Cotesworth v. Spokes*, 1861; *Ward v. Day*, 1864.

³ *Warwick v. Hooper*, 1850 (Ld. Truro, C.); *Croft v. Lumley*, 1857-8, H. L.; *Price v. Worwood*, 1859; *Davenport v. The Queen*, 1877, P. C. See *Keen v. Biscoe*, 1878.

⁴ *Doe v. Birch*, 1836.

⁵ *Grimwood v. Moss*, 1872.

⁶ *Goodright v. Davids*, 1778; *Walrond v. Hawkins*, 1875; *Roe v. Harrison*, 1788; *Doe v. Allen*, 1810; *Doe v. Rees*, 1838; *Arnsby v. Woodward*, 1827. In Ireland, however, it has now for some years been provided by statute (23 & 24 V. c. 154, § 43) that where any lease, made after the

1st of January, 1861, shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant, no act done or suffered by the landlord shall be deemed a dispensation therewith, or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord, or his authorized agent, in writing under his hand.

⁷ *Doe v. Woodbridge*, 1829; *Doe v. Peck*, 1830; *Ihyde v. Watts*, 1843; *Price v. Worwood*, 1859; *Doe v. Gladwin*, 1845; *Doe v. Jones*, 1850. See post, § 847.

⁸ *Zouch v. Willingale*, 1790; *Goodright v. Cordwent*, 1795; *Doe v. Batten*, 1775; *Doe v. Calvert*, 1810.

but of fact, which must consequently be determined by the jury.¹ When a valid notice to quit² has had the legal effect of determining a tenancy, the waiver of such notice does not revive the tenancy thus determined, but creates a new one.³

§ 808. To the instances above mentioned, in which the common law infers a waiver of the determination of a tenancy by conduct, must be added a case in which the Legislature⁴ has provided a conclusive inference from particular conduct. For it has provided that if a lease granted under a power be invalid by reason of some deviation from the terms of the power, the acceptance of rent under it shall be deemed a confirmation of the lease as against the person accepting the rent; provided such person, or some one else by his authority, shall, before or at the time of accepting the rent, sign a receipt, memorandum, or note in writing, confirming such lease.

§ 809.⁵ Admissions may also be implied from the *acquiescence* of the party. Acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party.⁶ And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood, by the party, before any inference can be drawn from his passiveness or silence.⁷ The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated.⁸ Examples of acquiescence are as follows. As between landlord and tenant, a landlord quietly suffering a tenant to expend money in making alterations and improvements on the premises, is evidence of his consent to the alterations;⁹ and

¹ *Blyth v. Dennett*, 1853; *Doe v. Batten*, 1775; *Vance v. Vance*, 1871 (Ir.).

² See *Holme v. Brunskill*, 1877, C. A.; *Ahearn v. Bellman*, 1879, C. A.

³ *Tayleur v. Wildin*, 1868.

⁴ By 13 & 14 V. c. 17, § 2.

⁵ 1 Gr. Ev. § 197, in great part.

⁶ *Allen v. McKeen*, 1833 (Am.).

⁷ See *Smith v. Hayes*, 1867 (Ir.); *Davies v. Marshall*, 1861; *Bickett v. Morris*, 1866, H. L.

⁸ *R. v. Mitchell*, 1892; *Melen v. Andrews*, 1829; explained in *Simpson v. Robinson*, 1848 (Ld. Denman); *R. v. Newman*, 1852; *Boyd v. Bolton*, 1844 (Ir.). See *Bigg v. Strong*, 1857.

⁹ *Doe v. Allen*, 1810; *Doe v. Pye*, 1795 (Ld. Kenyon); *Neale v. Parkin*, 1795 (id.). See, also, *Stanley v. White*, 1811; *Cotching v. Basset*, 1862. But merely lying by and passively witnessing a breach of covenant for several years is not

a tenant who, on *personally* receiving notice to quit on a particular day, makes no objection, will generally, in England,¹ be deemed to have admitted that his tenancy expires on that day;² but if he cannot read, or even if he did not read the notice in the presence of the person serving it upon him, it will be treated as a notice not personally served, and will go for nothing.^{2a} For the purposes of the bankruptcy laws, a debtor who hears himself inquired for and denied, thereby furnishes some evidence against himself that he is beginning to keep house with intent to defeat or delay his creditors, and, consequently, is committing an act of bankruptcy.³ In general, wherever one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation.⁴ Thus it was held that an executor who, having been served with notice of motion to pay into court part of the testator's estate, which was sworn by affidavit to have reached his hands, had, by his silence, and by refraining from disputing the facts deposed to, made a sufficient admission of their truth to justify the making of the order.⁵ And where two brothers, claiming derivative settlements from their father, having been removed by successive orders, and the examination of the father proving his settlement having been served upon the appellants together with the first order, against which there was no appeal, the fact of the appellants not objecting to the *ground of*

such an acquiescence as to amount to a waiver of the forfeiture: *Doe v. Allen*, 1810; *Perry v. Davis*, 1858; *Macaulay v. Robertson*, 1886 (Ir.); But see *Keating v. Bolton*, 1887 (Ir.), and also ante, § 808.

¹ The Irish law is regulated, in part, by § 6 of 23 & 24 V. c. 154, which enacts that "every tenancy from year to year shall be presumed to have commenced on the last gale day of the calendar year on which rent has become due and payable in respect of the premises, until it shall appear to the contrary;" and, in part, by § 58 of 33 & 34 V. c. 46.

² *Doe v. Biggs*, 1809; *Thomas v. Thomas*, 1811; *Doe v. Forster*, 1811; *Oakapple v. Copous*, 1791;

Doe v. Wombwell, 1811 (Ld. Ellenborough). See *Walker v. Godé*, 1861.

^{2a} *Doe v. Calvert*, 1810 (Ld. Ellenborough), explained *Thomas v. Thomas*, 1811; *Doe v. Forster*, 1811.

³ *Key v. Shaw*, 1832. See 46 & 47 V. c. 52, § 4, subs. 1 (D).

⁴ In *Morris v. Burdett*, 1808 (Ld. Ellenborough), a candidate not bound by statute to pay for the hustings erected for an election, had made use of them. In *Abbot v. Hermon*, 1830 (Am.), a schoolhouse had been used by the school district: *Hayden v. Madison*, 1830 (Am.).

⁵ *Freeman v. Cox*, 1878 (Jessel, M.R.); *Hampden v. Wallis*, 1884, C.A.

removal when they received the first son, was held slight evidence of an admission that the father was settled in their parish.¹

§ 810. There, moreover, may, as between debtor and creditor, also be admissions by conduct. Thus, raising an objection to one item of an account and making no remark as to the rest, will be evidence of an account stated as to those items to which no objection has been made;² and, *among merchants*, an account rendered will be regarded as allowed, if it be not objected to within a second or third post,³ or, at least, if it be kept for any length of time without making an objection.⁴ Ordinary accounts which have been sent by letter are not admissible against him, as evidence that he had acquiesced in their contents, merely because they have been kept by the addressee without remark.⁵ But what a party *says* when an account is delivered to him by hand, or upon a statement made in his presence, may be given in evidence against him along with the account or statement, because what is thus offered is the act or declaration of the party to be affected by it, and the account or the statement is by reference made a part of such act or declaration; though here, again, the naked fact that an account remains in the possession of a party to whom it was sent, does not amount to an acquiescence in its contents.⁶

§ 811. Lord Tenterden remarked⁷ that “what is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains.” A later case in the Court of Appeal also supports this view,⁸ and it appears to be the law.⁹ Lord Denman

¹ *R. v. Sow*, 1843.

² *Chisman v. Count*, 1841.

³ *Sherman v. Sherman*, 1787 (Hutchins, Ld. Com.).

⁴ *Willis v. Jernegan*, 1741 (Ld. Hardwicke); *Tickel v. Short*, 1750 (id.), where the account had been kept without objection for two years.

⁵ *Price v. Ramsay*, 1840 (Ir.).

⁶ *Price v. Ramsay*, 1840 (Ir.) (Bushe, C.J.).

⁷ In *Fairlie v. Denton*, 1828.

⁸ *Wiedeman v. Walpole*, 1891.

⁹ However, in *Gaskill v. Skeene*,

1857, the Queen's Bench held, that letters containing a demand, written to a defendant, and unanswered by him, were admissible in evidence for the plaintiff, though they also stated facts showing how the demand arose; but possibly that case rested on the ground, that the defendant had made some unsatisfactory statements respecting these letters, in a subsequent conversation with the plaintiff's agent. On this last ground unanswered letters written to a party have been admitted as evidence in

too, once declared, that "it was a great deal too broad a proposition to say, that every paper which a man might hold, purporting to charge him with a debt or liability, was evidence against him if he produced it."¹

§ 812. An admission by conduct may, too, be made by being found in possession of letters and other papers, as it is a *prima facie* inference that the person in whose possession they are found knows their contents and has acted upon them.² Such evidence is occasionally available in a civil suit.² It is frequently received in criminal prosecutions, especially those for conspiracy and treason, though its weight, as evidence against the prisoner, will in a great measure depend on the fact, whether answers to the letters or papers can be traced, or whether anything can be shown to have been done upon them.³ The mere⁴ opportunity of constant access to documents may, indeed, sometimes, by raising a presumption that their contents are known, afford ground for affecting parties with an implied admission of the truth or correctness of such contents.⁵ Thus, the rules of a club, or a record of the proceedings of a society, contained in a book kept by the proper officer and accessible to the members,⁶—charges against a club, entered by the servants of the house in a book kept for that purpose open in the club-room,⁷ and the like,—are admissible against the members; their knowledge of the contents of the books, and their acquiescence therein, being presumable under the circumstances. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer, or co-partners, will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities from time to time for testing the accuracy of the entries.⁸

America: *Dutton v. Woodman*, 1852 (Am.). See, also, *Keen v. Priest*, 1858; *Lucy v. Mouffet*, 1860; *Carne v. Steer*, 1860; and *Gore v. Hawsey*, 1862 (Martin, B.).

¹ In *Doe v. Frankis*, 1840.

² *Hewitt v. Piggott*, 1831.

³ *R. v. Horne Tooke*, 1794 (Eyre, C.J.); *R. v. Watson*, 1817.

⁴ Gr. Ev. § 198, in part.

⁵ See, however, *Hallmark's case*, 1878, C. A.; disapproving of *Wheatcroft's case*, 1873; and *Ex parte Brown*, 1854.

⁶ *Raggett v. Musgrave*, 1827 (Abbott, C.J.); *Alderson v. Clay*, 1816 (Ld. Ellenborough); *Ashpitel v. Sercombe*, 1850.

⁷ *Wiltzie v. Adamson*, 1789.

⁸ *Symonds v. Gas Light and Coke*

§ 813.¹ Admissions are too, sometimes, inferred from *acquiescence in the oral statements of others*. At the same time the maxim, *Qui tacet consentire videtur*,—however it may be recognised by the lover,—must be applied by the lawyer with careful discrimination. “Nothing,” it has been observed, “can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be received at all, unless the evidence is of direct declarations of that kind which naturally calls for contradiction—some assertions made to the party with respect to his right, which by his silence he acquiesces in.”² A distinction has accordingly been taken *between declarations made by a party interested and those made by a stranger*; and while what one party declares to the other without contradiction is admissible evidence, what is said to a party by a third person may well be inadmissible. It may be impertinent, and be best rebuked by silence.³ Still less will statements made by strangers in the presence of a party be receivable against him, if they be *not directly addressed* to him; because, in such case, he can scarcely under any circumstances be called upon to interfere.⁴

§ 814. Moreover, to affect one person with the statements of others, on the ground of his implied admission of their truth by silent acquiescence, it is not enough that they were made in his presence, or even to himself, by parties interested, but they must also have been made on an *occasion when a reply from him might be properly expected*.⁵ Depositions, therefore, taken in the presence of a party during a judicial investigation, observations made by a magistrate to the parties before him, and confessions of an accomplice criminating his co-prisoner before the justices, will not, in general,⁶ be evidence in any subsequent trial, whether civil or criminal, against the party who heard them in silence; because in

Co., 1848; *Boardman v. Jackson*, 1813 (Ir.); *Kilbee v. Sneyd*, 1828 (Ir.); *Lodge v. Prichard*, 1853; R. S. C. 1883, Ord. XXXIII. r. 3.

¹ Gr. Ev. § 199, in great part.

² *Moore v. Smith*, 1826 (Am.) (Duncan, C.J.).

³ *Child v. Grave*, 1825 (Best, C.J.).

⁴ *Moore v. Smith*, 1826 (Am.).

⁵ *Boyd v. Bolton*, 1844 (Ir.).

⁶ This cannot be laid down as a strict rule of law applicable on all occasions; for, as *Ld. Denman* observed in *Simpson v. Robinson*, 1848, “cases may certainly be conceived in which a party, by not denying a charge made against him in a court of justice, may possibly afford strong proof that the imputation is just.” See *R. v. Coyle*, 1855.

judicial inquiries a strictness of proceeding is adopted, which often prevents a person from interfering when and how he pleases, as he naturally would do in a common conversation.¹ The same inferences cannot, therefore, be drawn from his silence or his conduct on such occasions as might reasonably result from similar behaviour, were he under no restraint; and as it is only for the sake of these inferences that the statements of other parties can ever be admitted, they are properly rejected whenever they do not warrant the inferences sought to be drawn from them. A similar distinction has been recognised in the civil law, by which “*confessio facta seu præsumpta ex taciturnitate in aliquo iudicio, non nocebit in alio.*”²

§ 815. If, however, the statement of one person calls forth a *reply* from another, such statement may then be read in conjunction with the reply, and will become evidence against the party replying so far as the answer directly or indirectly admits its truth; and it will make no difference in the application of this rule, whether the words were spoken by an interested party or a stranger,—whether they were addressed or not to the party replying,—or whether they fell from the parties, the witnesses, or the court, in a judicial proceeding, or were uttered during the course of an ordinary conversation.³

§ 816.⁴ But the *silence* of the party, even where the declarations are addressed to himself, at a time, too, when he is at full liberty to reply as he thinks fit, is, at best, worth very little as evidence of acquiescence;⁵ and if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it is almost valueless.⁶ In all these cases it must be distinctly remembered, that the statement made in the party’s presence or hearing⁷ is not evidence against him, but his own conduct in consequence of such statement is the sole evidence. Magistrates often

¹ *Melen v. Andrews*, 1829 (Parke, J.); *Short v. Stoy*, 1836, cited in *Boscoe*, Ev. 54, 55, as ruled by Alderson, B.; *R. v. Appleby*, 1821 (Holloyd, J.); *R. v. Turner*, 1832 (Patterson, J.); *Child v. Grace*, 1825.

² 1 Masc. de Prob. concl. 348, n. 31.

³ *Child v. Grace*, 1825; *Jones v. Morrell*, 1844 (Ld. Denman); *R. v. Edmunds*, 1833 (Tindal, C.J.); *Boyd*

v. Bolton, 1844 (Ir.).

⁴ Gr. Ev. § 199, in part.

⁵ See Ch. 26 of St. Matthew, v. 59—63; and Ch. 27, v. 12—14.

⁶ *Hayslep v. Gymer*, 1834 (Parke, J.). See, further, on the subject of tacit admissions, *The State v. Rawls*, 1820 (Am.); *Batturs v. Sellers*, 1820 (Am.).

⁷ See *Neile v. Jakle*, 1849.

make mistakes on this subject ; but it is highly important that the distinction should be observed.¹

§ 817.² The *effect* of admissions, when proved, must next be considered. With regard to their *conclusiveness*, the policy of the law favours the investigation of truth by all expedient methods ; the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded.³ It is also to be observed, that estoppels bind only parties and privies ; and not strangers. Hence a sheriff, who, in favour of a creditor, seizes goods as the property of the debtor, is not bound by an estoppel which would have prevented the debtor himself from claiming the goods.⁴ Neither are the creditors or the trustee of a bankrupt bound by the bankrupt's admissions, because the court regards them as claiming adversely to the bankrupt.⁵ Again, though a stranger may often rely on an admission, which parties or privies might set up as an estoppel, yet, in his case, it is only matter of evidence to be considered by the jury.

§ 818. In an action⁶ in which an alleged bankrupt sought to dispute his bankruptcy, the defendants contended that the plaintiff was estopped from bringing this action, as (in addition to other evidence of his acquiescence in their title) he had given notice to the lessors of a farm which he held that he had become bankrupt, and was willing to give up the lease, whereupon the lessors had accepted such lease, and taken possession of the premises. Upon the question whether the plaintiff was precluded by this surrender from disputing the commission in the present suit, Bayley, J., said : " There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him ; but we think that

¹ Per Alderson, B., at Maidstone Sp. Ass. 1842, MS. ; Doe v. Frankis, 1840 (Ld. Denman).

² Gr. Ev. § 204, in part.

³ See ante, § 89.

⁴ Richards v. Johnston, 1859.

⁵ Harris v. Rickett, 1859 (Bramwell, B.) ; Ex parte Revell, In re Tollemache, No. 1, 1884.

⁶ Heane v. Rogers, 1829. See Morgan v. Couchman, 1853 ; Painter v. Abel, 1862 (Erle, C.J.) ; Welland Canal Co. v. Hathaway, 1832 (Am.) ; Jennings v. Whittaker, 1826 (Am.). See, also, Ld. Londesborough's case, 1853 ; and Ld. Londesborough v. Foster, 1863.

he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies, not strangers.¹ The offer of surrender made in this case was to a *stranger to this suit*; and though the bankrupt may have been bound by his representation that he was a bankrupt, and his acting as such, as between him and the stranger to whom that representation was made, and who acted upon it, he is not bound as between him and the defendants, who did not act on the faith of that representation at all."

§ 819. The doctrine propounded in the above judgment, that a party is always at liberty to prove that his admissions were founded on *mistake*, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of fact.² In all cases of this nature, the jury, with the view of estimating the effect due to an admission, will be justified in considering the circumstances under which it was made; and if it should appear to have been made under an erroneous notion of legal liability, they may qualify its effect accordingly.³

§ 820. But while admissions are, as a rule, not *conclusive*, and may be shown to have been made under a mistake, certain admissions undoubtedly are conclusive. First amongst these are *estoppels*, which have been considered in a former part of this work: we have there treated of estoppels by deed, alluded to those by record, and discussed that particular class of estoppels in pais, which relates to the rights of landlord and tenant.⁴ In the present chapter it has already been shown that admissions solemnly made in the course of judicial proceedings, whether as a substitute for regular proof, or in a case stated for the opinion of the court, are, on motives of

¹ Co. Lit. 352 a.; Com. Dig. Estop. C.

² *Newton v. Liddiard*, 1848 (Ld. Denman).

³ *Newton v. Belcher*, 1848; and *Newton v. Liddiard*, 1848.

⁴ Ante, §§ 89—103.

policy and justice, deemed to be conclusive.¹ It only remains to examine the law as it regards other *conclusive admissions*; and these will, in general, be found to range themselves under one or other of the following heads. First, admissions expressly or tacitly made by *pleadings*; secondly, admissions which have been *acted upon* by others. To these may be added a few cases of fraud and illegality, and some admissions on oath, where the party is estopped on grounds of public policy.

§ 821. With respect to *admissions by pleading*, the law at present seems to be that statements which are contained in any pleading, though binding on the party making them for all purposes in the cause, ought not to be regarded in any subsequent action as admissions.² It was at one time, indeed, thought that a party might, by bringing an action on a contract, estop himself from denying the obligatory force of it as an agreement in a subsequent action against himself. Accordingly, Tindal, C. J.,³ once expressed a strong opinion that if a corporation were to make an executory contract invalid against themselves for not being under seal, and then to sue thereon, this would amount to an admission on record that such contract was duly entered into on their part, so as to be obligatory on them; and would estop them, in answer to a counterclaim in the same action, or to another action by the defendants in a *cross action*, from setting up that it was not sealed by their common seal. But the doctrine as a whole on which this expression is founded, although unquestionably based on substantial justice, has hitherto met with little favour, and will probably ere long be expressly overruled.⁴

§ 822. At any rate, an admission, *incidentally* or *tacitly* made in pleading in one suit, will not, as a rule, estop the party who has made it from denying in another suit, where *precisely the same matter is not litigated*, the fact so admitted. For instance, where a plea to an action on a bond set out a corrupt agreement between the parties irrespective of the bond, and went on to aver that the

¹ Ante, §§ 772, 783.

² Cases cited in note ⁴; Neeson v. Walters, 1890.

³ Fishmongers' Co. v. Robertson, 1843.

⁴ See Copper Miners' Co. v. Fox, 1851; Boileau v. Rutlin, 1848 (Parke, B.); Buckmaster v. Meiklejohn, 1853 (id.); The May. of Kidderminster v. Hardwicke, 1873.

bond was given to secure, among other moneys, the sum mentioned, in the *said* agreement; and the replication, tacitly admitting the corrupt agreement, traversed the fact of the bond having been given in consideration thereof, but the plaintiff failed on this issue; the admission was held available for the purpose of that suit only; and the plaintiff was consequently allowed to dispute the corrupt nature of the agreement, in a subsequent action on a collateral security.¹

§ 823. An exception to this general rule arises, however, where the second action is brought on a judgment recovered in the first. For example, an executor or administrator who confesses judgment, or suffers it to go against him by default, thereby admits assets in his hands, and is estopped to say the contrary in an action on such judgment, suggesting a *devastavit*.² In order to charge the executor or administrator, indeed, even in such a case, *some* proof must be given that the assets have been wasted; but the slightest evidence will suffice for this purpose; and the mere issuing of a writ of *fieri facias*, directed to the county where the action was laid, and a return of *nulla bona* thereto, has, for a long time past, been deemed evidence enough.³ In accordance with these principles, where, in an action against three executors, two had pleaded *plene administraverunt*, and the third admitted assets to the amount of 383*l.*, in a subsequent action against the third executor, suggesting a *devastavit*, the plaintiff was held entitled to recover; defendant's admissions in the former action being an admission of assets to the amount of 383*l.*, and the fact that she had given a cheque for that amount (which had been in fact dishonoured), being *primâ facie* evidence of a *devastavit* to that amount.⁴

§ 824. Questions with respect to admissions in pleading, chiefly, however, arise with regard to their effect in the *same suit*. In Admiralty, for instance, where a statement of claim in a salvage action is admitted, no evidence at all is in general receivable (unless special leave for its reception is given) in support of the plaintiff's case, which the statement of claim is required to state

¹ *Carter v. James*, 1844. See *Rigge v. Burbidge*, 1846; and *Hutt v. Morrell*, 1849 (Pollock, C.B.).

² *Skelton v. Hawling*, 1749; Re *Trustee Relief Act, Higgins' Trusts*,

1861.

³ *Leonard v. Simpson*, 1835 (Tindal, C.J.).

⁴ *Cooper v. Taylor*, 1844.

completely.¹ And both in the Queen's Bench and Chancery Divisions the broad rule is that "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be *taken to be admitted*, except as against an infant, lunatic, or person of unsound mind not so found by inquisition."² The proper understanding of this rule is the province of the pleader:³ and a detailed explanation of its effects must be sought in works on pleading. The rule, however, operates only with respect to *material* allegations. If, therefore, a statement of defence denies a particular fact alleged in the statement of claim, it does not thereby admit all the immaterial averments, which the pleader has chosen to introduce as part of the plaintiff's case.⁴

§ 825. Accordingly, where a plaintiff's claim—after stating that the defendants were *owners* of a vessel, on which the plaintiff caused to be shipped some potatoes to be carried by them, as *owners* of the vessel, to Liverpool; and that in consideration thereof, and of freight, they promised to carry the potatoes safely *as aforesaid*—alleged as a breach, that through their negligence the goods were damaged; it was held, that a defence of the general issue in answer to such claim did not by implication admit that the defendants were owners, so as to raise the inference that the captain was their agent, since the allegation of ownership was immaterial. The claim would have been equally good had no such allegation been made.⁵

§ 826. But the omission to traverse a *material* allegation, so far conclusively admits it, that the *party who thus pleads over cannot disprove it*. Therefore, where, in trover for goods, defendant pleaded that A. was factor of the plaintiffs, and as such, before and at the time of the pledge mentioned in the plea, was *intrusted by them with*, and was in possession of, dock-warrants relating to the goods;

¹ The *Hardwicke*, 1883.

² R. S. C. 1883, Ord. XIX. r. 13. But see, and attempt to reconcile, this rule with r. 13 of Ord. XXVII., cited post, § 829.

³ *Van Sandau v. Turner*, 1845 (Ld. Denman).

⁴ See *Bingham v. Stanley*, 1841; *Bennion v. Davison*, 1838; *Dunford v. Trattles*, 1844 (Parke, B.); *King v. Norman*, 1847.

⁵ *Bennion v. Davison*, 1838 (Parke, B.); recognized (Alderson, B.) in *Dunford v. Trattles*, 1844. See, also, *Grew v. Hill*, 1849.

that he delivered the dock-warrants to the defendant, and pledged with him the goods, as security for a loan which the defendant then advanced to him on the faith of the said dock-warrants; and that the defendant had no notice that the factor was not the actual owner; the plaintiffs were held to be debarred from proving that the dock-warrants had not been deposited at the time of the advance; and were, in fact, not then in existence, where they had simply traversed the allegation that the defendant advanced the money on the faith of the dock-warrants.¹

§ 827. Under R. S. C., 1883, Ord. XXXII., r. 6, “any party may, at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as, upon such *admissions*, he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think fit.” Under this rule, in a partition action, where the defendants have, by their statement of defence, admitted the facts stated in the claim showing the plaintiff’s title, the plaintiff has a right,—instead of having the action set down for hearing,—to an order on motion, directing the usual inquiries as to the persons interested in the property;² in an action between partners,³ and in one between principal and agent,⁴ an order for an account and for the delivery of securities has been made on motion before the hearing, the judge acting solely on the admissions contained in the pleadings;⁵ and a plaintiff may move for judgment upon admissions, although he has joined issue on the defence, and given notice of trial.⁶ But in cases under the rule, as the judge has a discretion whether he will grant relief on motion or not, he will seldom take that step when any question of difficulty is raised; neither will the Court of Appeal, except in a clear case of error, interfere with the judge’s exercise of his discretion.⁷

¹ *Bonzi v. Stewart*, 1842. See, also, *Carter v. James*, 1844.

² *Gilbert v. Smith*, 1876, C. A.; *Hetherington v. Longrigg*, 1879 (Hall, V.-C.).

³ *Turquand v. Wilson*, 1875.

⁴ *Rumsey v. Reade*, 1876.

⁵ See, also, *Jenkins v. Davies*, 1876; *In re Smith’s Estate*, *Bridson v. Smith*, 1876 (Hall, V.-C.); *In re Barker’s Estate*, 1878 (id.).

⁶ *Brown v. Pearson*, 1882 (Fry, J.).

⁷ *Mellor v. Sidebottom*, 1877.

§ 828. Under the old rules of pleading, a demurrer was regarded by Courts of Equity as simply raising the question of law without any admission of the truth of the allegations in the bill; but in Courts of Law it was held to amount to an absolute admission of the facts stated in the paragraphs demurred to.¹ The R.R. S. C. of 1883 have abolished demurrers altogether by Ord. XXV., r. 2, and substituted certain other proceedings.^{1a}

§ 829. It is further provided, by R. S. C., 1883, Ord. XXVII., r. 13, that "if the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be *deemed to have been denied* and put in issue."²

§ 830. Marriages which took place between 30th July, 1874, and 1st January, 1883, are governed by the Married Women's Property Act, 1874,³ which enacted, with respect to such marriages, that husbands and wives should be jointly sued for debts incurred or torts committed by the wife before marriage, but that the husband should be liable to the extent only of the assets therein specified,⁴ provided that, if no plea denying liability be pleaded, "the husband shall be deemed to have confessed his liability so far as assets are concerned."⁵

§ 831. Next, as to the effect by way of admission of *paying money into court*,⁶ and of *tendering compensation*. Payment of money into court may be made, as of course, in *any*⁷ action which is brought to recover a debt or damages.⁸ Amends may also be

¹ See *Metrop. Rail. Co. v. Defries*, 1877; and Rules of 1875, Ord. XXVIII.

^{1a} See, also, rr. 3, 4, and 5 of same Order. See *Burstall v. Beyfus*, 1884, C. A.

² See, also, R. S. C. Ord. XIX. r. 13, cited ante, § 824.

³ 37 & 38 V. c. 50.

⁴ §§ 1, 2, and 5.

⁵ § 2. See *Matthews v. Whittle*, 1880 (Jessel, M.R.). The Married Women's Property Act, 1874, was repealed by 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 14, 15 of which regulate

the respective liabilities of husbands and wives married since 1st January, 1883.

⁶ It must—except, possibly, in one or two other cases (as to which see ante, § 315, ad fin.)—be made before delivering a defence, and must in any case be pleaded, though it may be so pleaded to the whole or any part of the plaintiff's claim. See R. S. C. 1883, Ord. XXII. r. 4.

⁷ See *Hawksley v. Bradshaw*, 1880, C. A., from which it will be seen that there are one or two exceptions.

⁸ R. S. C. 1883, Ord. XXII. r. 1. See, further, *id.* rr. 2, 4, and 5.

paid into court in some special actions under the provisions of particular statutes. For instance, in an action for a libel contained in any newspaper or other periodical publication, whether in England or Ireland, the defendant may plead that the language complained of was inserted without actual malice, and without gross negligence, and that at the earliest opportunity he had published, or, in some cases, had offered to publish, an ample apology, and that a certain sum of money has been paid into court by way of amends.¹ Many other statutes also authorise the tender of amends and pleas of payment of money into court.²

§ 832-7. In these and other cases a payment into court, when unaccompanied by any defence denying liability, is "taken to admit the claim or cause of action in respect of which the payment is made." Defendants may now in any cause, except in actions or counterclaims for libel or slander, plead payment of money into court together with any other pleas, either denying the plaintiff's right of action, or setting up some special defence.³

§ 838.⁴ When judicial admissions,—by which are meant admissions entered into in the due course of legal proceedings,—have been *made through inadvertence or mistake*, the court, in its discretion, will in some manner relieve the party from the consequences

R. 7, by imposing upon the plaintiff the duty of giving the defendant a special notice, exposes him to the risk of losing his costs in the event of his neglecting to comply with that rule. See *Langridge v. Campbell*, 1877, as explained by *Buckton v. Higgs*, 1879. See, also, *Greaves v. Fleming*, 1879.

¹ See 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 2, as amended by 42 & 43 V. c. 59; and 8 & 9 V. c. 75 ("The Libel Act, 1845"), § 2, as to England; and 8 & 9 V. c. 75, § 2, as to Ireland. In the absence of the allegation of payment into Court, plaintiff may treat the plea as a nullity. The plaintiff is absolutely entitled to money paid into court under this Act, whatever damages he recover: *Dunn v. Devon, &c. Newspaper Co.*, 1894; but money paid into court under Ord. XXII. r. 5 is subject to the jurisdiction of

the court: *Gray v. Bartholomew*, 1894, C. A.

² These generally apply to actions brought against persons for acts done by them, either in execution of their offices, or in pursuance or under the authority of Acts of Parliament (see ante, §§ 311—315); and among these may be mentioned, "The Public Authorities Protection Act, 1893" (56 & 57 V. c. 61), § 1 (c), set out ante, § 73A. "The Seamen's Clothing Act, 1869" (32 & 33 V. c. 57, § 6), "The Army Act, 1881" (44 & 45 V. c. 58, § 170, subs. 2), and "The Militia Act, 1882" (45 & 46 V. c. 49, § 46, subs. 3).

³ R. S. C. 1883, Ord. XXII. r. 1, cited ante, § 831, n. ⁸, expressly repeals the doctrine allowing such a defence in libel or slander previously established by *Hawkesley v. Bradshaw*, 1880, C. A. See, also, *Berdan v. Greenwood*, 1878, C. A.

⁴ Gr. Ev. § 206, nearly verbatim.

of his error.¹ Even agreements made out of court between solicitors, concerning the course of proceedings in court, are, in effect, equally under the court's control, by means of its coercive power over the solicitor in all matters relating to professional character and conduct. But, in all these cases, the party will be held to his admission, unless it *clearly* appear that he has acted through mistake.²

§ 839.³ It is a broad rule of law that every admission, which has been made with the intention of being acted upon, and which has been *acted upon by another person*, is conclusive against the party making it, in all cases between him and the individual whose conduct he has thus influenced; and this, whether such admission be made in express language to the person who acts upon it, or be implied from the general conduct of the party making it. In the latter case, the implied declaration will be considered as having been addressed to every one in particular, who may have had occasion to act upon it: and the rule of law is clear, that, where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.⁴ Indeed, the principle may be laid down still more broadly, as precluding any party, who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, from disputing that fact in an action against the person whom he has himself assisted in deceiving.⁵ In such case the party is estopped, on the grounds of public policy and good faith, from repudiating his own representations.⁶

¹ Dig. lib. 42, tit. 2, l. 2.

² See *Pearse v. Grove*, 1747 (Ld. Hardwicke). The Roman law was administered in the same spirit. "Si is, cum quo Lege Aquilia agitur, confessus est servum occidisse, licet non occiderit, si tamen occisus sit homo, ex confesso tenetur": Dig. lib. 42, tit. 2, l. 4; id. l. 6. See, also, Van Leeuw. Comm., B. V. ch. 21; Everh. Conc. 155, n. 3.

"Confessus pro judicato est": Dig. lib. 42, tit. 2, l. 1.

³ Gr. Ev. § 207, in part.

⁴ *Pickard v. Sears*, 1837 (Ld. Denman); recognized (Wood, V.-C.) in *Att.-Gen. v. Stephens*, 1855.

⁵ Per Ld. Denman, in *Gregg v. Wells*, 1839; recognized by Parke, B., in *Harrison v. Wright*, 1845.

⁶ See ante, §§ 89 et seq.

§ 840. The meaning of the word "wilful," as used above, has been the subject of divergent judicial remarks.¹

§ 841. Another instance of a conclusive admission arises where a party, having a secret equity, chooses to stand by, and permit the apparent owner to deal with others as if he were the absolute owner, in which case he will not be permitted to assert such secret equity against a title founded on such apparent ownership.² For example, where³ a landowner had signed, and put into the hands of his agent, an authority to consent to any exchanges under an Inclosure Act, and had directed him not to act upon this authority excepting under certain circumstances; but the agent, in breach of his private instructions, had produced the authority and agreed to an exchange not under the stipulated circumstances, the landowner was held to be bound by the agreement made under these circumstances. The courts have also acted upon this doctrine on several occasions,

¹ In *Freeman v. Cooke*, 1848, *Ld. Wensleydale* observed:—"By the term 'wilfully,' we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth [the rule, as here enunciated, was expressly adopted by the Court of Exchequer in *Cornish v. Abington*, 1839. See, too, *Sweeny v. Promoter Life Ass. Co.*, 1863 (*Ir.*); *Thomas v. Brown*, 1876; and *M'Kenzie v. British Linen Co.*, 1881, *H. L.*]; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect;—as, for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer autho-

rized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized." In *Howard v. Hudson*, 1853, *Ld. Campbell* observed:—"The party setting up such a bar to the reception of the truth must show, both that there was a *wilful* intent to make him act on the faith of the representation, and that he did so act." But *Crompton, V.-C.*, says:—"The rule takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not *malo animo*, but so far wilfully that the party making the representation on which the other acts *means* it to be acted upon in that way. That is the true criterion." See, further, on this subject, *Foster v. Mentor Life Ass. Co.*, 1854.

² *Mangles v. Dixon*, 1849 (*Ld. Cottenham*). See, also, *Att.-Gen. v. Naylor*, 1864 (*Wood, V.-C.*); *Ramsden v. Dyson*, 1865, *H. L.*; *Rolt v. White*, 1862 (*Ld. Westbury*).

³ *Duke of Beaufort v. Neald*, 1844, *H. L.* See *Graham v. Birkenhead Rail. Co.*, 1850; *Kent v. Jackson*, 1851 (*Romilly, M.R.*); *Trickett v. Tomlinson*, 1863; *Pole v. Leask*, 1864, *H. L.*

where negotiations have been entered into preparatory to marriage. The abstract rule deducible from the authorities on the whole is, that, whenever a representation¹ of some *fact*,—as contradistinguished from a mere representation of *intention*,²—has been made by one party for the purpose of influencing the conduct of another, and has been acted upon by the latter, this will, in general, be sufficient to entitle him to the assistance of the court for the purpose of realising such representation.³

§ 842.⁴ A further example of a conclusive admission arising from conduct occurs in the case of a man cohabiting with a mistress, and treating her in the face of the world as his wife. Here, though he thereby acquires no rights against others, they possibly may do so against him. For instance, if the woman during such cohabitation be supplied with goods ostensibly for the use of the joint household, and the reputed husband be sued for their price, he will not be permitted to disprove the marriage, but the jury will be justified, as in the case of a real wife, in dealing with the question as one of ordinary domestic agency.⁵ The old doctrine of the presumptive agency of a real wife has, however, been encroached upon, if not actually set aside, by an enactment in the Married Women's Property Act, 1893,⁶ that⁷ "every contract hereafter entered into by a married woman, otherwise than as an agent, shall be deemed (a) to be a contract entered into by her with respect to and

¹ *Ld. Cranworth* is said to have held that the rule does not apply unless there be *misrepresentation*. See *qu.* See *Money v. Jorden*, 1852; *Pulsford v. Richards*, 1853.

² *Jorden v. Money*, 1854, H. L. (*Ld. Cranworth*, C., and *Ld. Brougham*; *Ld. St. Leonards* diss.), overruling a decision of *Romilly*, M.R., in *Money v. Jorden*, 1852. See *Maddison v. Alderson*, 1883, H. L., and questioning *Loffus v. Maw*, 1862 (*Stuart*, V.-C.). See, also, post, § 1043.

³ *Hammersley v. Baron de Biel*, 1845, H. L. (*Ld. Cottenham*); *id.* (*Ld. Campbell*); *Neville v. Wilkinson*, 1782; *Montefiori v. Montefiori*, 1762; *Bentley v. Mackay*, 1862 (*Romilly*, M.R.); *Laver v. Fielder*, 1862 (*id.*); *Gale v. Lindo*, 1887; *Jorden v. Money*, 1854, H. L.; *Money v. Jorden*, 1852; *Hutton*

v. Rossiter, 1854-5; *Pulsford v. Richards*, 1851 (*Romilly*, M.R.); *Yeomans v. Williams*, 1865; *Hodgson v. Hutchenson*, 1712; *Cookes v. Mascall*, 1694; *Wankford v. Fotherley*, 1694; *Luders v. Anstey*, 1799; *Middleton v. Pollock*, *Ex parte Wetherall*, 1876. See *Wright v. Snowe*, 1848; *Maunsell v. White*, 1854, H. L.; *Bold v. Hutchinson*, 1855; *Traill v. Baring*, 1864.

⁴ *Gr. Ev.* § 207, in part, as to first seven lines.

⁵ *Watson v. Threlkeld*, 1798; *Robinson v. Nahon*, 1808; *Munro v. De Chemant*, 1815. See ante, § 192. Also, *Mace v. Cadell*, 1774; recognized in *Batthews v. Galindo*, 1828.

⁶ 56 & 57 V. c. 63. See *Myles v. Burton*, 1884 (*Ir.*).

⁷ § 1.

to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." By § 2 of the same Act,¹ a married woman's separate property which she is restrained from anticipating may be made liable for costs, and a receiver or a sale of it directed.

§ 843.² Yet another example of a conclusive admission arising from conduct is where a person knowingly permits his name to be used as one of the partners in a trading firm, or an existing joint-stock company, under such circumstances of publicity as to satisfy the jury that a stranger knew of it, and believed him to be a partner, for under such circumstances he is liable to such stranger in all transactions, in which the latter engaged and gave credit upon the faith of his being such partner.³ The mere fact of a person agreeing to become a member of the *provisional committee* of an intended railway company, or even the fact of such person authorising his name to be published in a prospectus, which contains nothing more than the names of the provisional committee-men, will not indeed render him liable for contracts made by the other members or by the solicitor, for the purpose of promoting the objects in view; because such an intended association does not amount to a partnership, as it constitutes no agreement to share in profit and loss.⁴ But if there be evidence that such person has *acted* with relation to the proposed scheme, as by attending meetings, giving directions, and the like, it will be for the jury to

¹ 56 & 57 V. c. 63.

² Gr. Ev. 207, in part.

³ *Dickinson v. Valpy*, 1829 (Parke, J.); *Wood v. Duke of Argyll*, 1848 (Cresswell, J.); *Harrison v. Heathorn*, 1843 (Tindal, C.J.); *Fox v. Clifton*, 1830 (id.). See, also, *Kell v. Nainby*, 1829; *Guidon v. Robson*, 1809 (Ld.

Ellenborough).

⁴ *Reynell v. Lewis*, and *Wyld v. Hopkins*, 1846. See *Ex parte Cottle*, 1850; *Ex parte Roberts*, 1850; *Norris v. Cottle*, 1850, H. L.; *Hutton v. Upfill*, 1850, H. L.; *Bright v. Hutton*, and *Hutton v. Bright*, 1851-52, H. L.; *McEwan v. Campbell*, 1857, H. L.

determine¹ whether he has not thereby authorised the managing committee, or the other members of the provisional committee, or the solicitor or secretary of the intended company, to pledge his credit for the necessary and ordinary expenses to be incurred in forming the company; and if they decide this question in the affirmative, they may then give a verdict against him, on further finding that the work was done, and the credit given, on the faith of his being liable.²

§ 844. On the same principle, if a man, by holding out false colours, induces a railway company to register him as a proprietor of shares, and, subsequently, to bring an action against him for calls on such shares, he will be precluded from disputing the validity of the transfer to him, or from otherwise denying his character as a shareholder.³ And, on the other hand, where a company has registered a person as a shareholder, and has induced him, on the faith of such registration, to pay a call, they will not be allowed to dispute his title to the shares.⁴ Again, on the same principle, an infant who has deceived a tradesman by fraudulently representing himself to be of full age, and thus obtained credit for goods, will be held bound by his statement,⁵ and liable to pay the debt; and a person who has assumed to act as a broker of the city of London cannot, as against a party who has employed him, protect himself from a discovery of his dealings with such party, on the ground that his answer may expose him to penalties for having acted as a broker without being duly qualified.⁶

¹ *Williams v. Pigott*, 1848; *Bright v. Hutton*, and *Hutton v. Bright*, 1851-52, H. L.

² *Reynell v. Lewis*, and *Wylde v. Hopkins*, 1846; *Lake v. D. of Argyll*, 1844. See *Higgins v. Hopkins*, 1848; *Burnside v. Dayrell*, 1849; *Bailey v. Macaulay*, 1849; *Rennie v. Clarke*, 1850; *Rennie v. Wynn*, 1849; *Ex parte Besley*, 1850.

³ *Sheffield & Manch. Rail. Co. v. Woodcock*, 1841; *Cheltenham & Gt. West. Union Rail. Co. v. Daniel*, 1841; *In re North of Eng. Jt. St. Bk. Co.*, *Ex parte Straffon's Exors.*, 1853; *Taylor v. Hughes*, 1844 (Ir.). See *Swan v. North Brit. Austral. Co.*, 1863.

⁴ *Hart v. Frontino, &c. Gold Mining Co.*, 1870; *Re Bahia & Francisco Rail. Co. v. Tritten*, 1868. See, also, *Webb v. Herne Bay Improving Com.*, 1870; and *Simm v. Anglo-Amer. Teleg. Co.*, 1880, C. A.

⁵ *Ex parte Unity Jt. St. Mutual Bank. Associat.*, *In re King*, 1858; *Nelson v. Stocker*, 1859. The old common law rule, as recognised in the following cases, is no longer law. *Price v. Hewett*, 1852; *Liverpool Adelphi Loan Associat. v. Fairhurst*, 1854; *Bartlett v. Wells*, 1861; *De Roo v. Foster*, 1862.

⁶ *Robinson v. Kitchin*, 1856; *Green v. Weaver*, 1827.

§ 845. Conduct, again, furnishes an admission which is conclusive where parties have acted upon a state of facts mutually assumed as existing. In such a case their rights between themselves will depend on such assumption, and not upon the truth.¹ Accordingly, if a party has taken advantage of, or voluntarily acted under, the bankrupt or insolvent laws, he will not be permitted, as against parties to the proceedings, to deny their regularity;² the grantee of an annuity, whose duty it formerly was³ to have the memorial properly enrolled, was not allowed to take advantage of his own neglect, and set up the want of enrolment against the grantor, although the statute declared that in case of non-enrolment annuity deeds should be void;⁴ an agent or a workman who has knowingly rendered an untrue account to his principal or employer, which has been adopted by the party to whom it was given, cannot afterwards gainsay it;⁵ the receipt of a man who thereby has acknowledged that he has received money from an agent on account of his principal, and accredited the agent with the principal to that amount, is conclusive as to payment by the agent;⁶ a landlord who has, with knowledge of all the facts, received rent from the widow of his lessee for several years is estopped from alleging afterwards that she has not taken out probate;⁷ if a person having a right to property, whether real⁸ or personal,⁹ permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right; and if the owner of an instrument

¹ *M'Cance v. Lond. & N. W. Rail. Co.*, 1864.

² Like *v. Howe*, 1806; *Clarke v. Clarke*, 1806; *Gouldie v. Gunston*, 1816; *Watson v. Wace*, 1826, explained in *Heane v. Rogers*, 1806; *Mercer v. Wise*, 1800; *Harmar v. Davis*, 1817; *Flower v. Herbert*, 1851. See ante, §§ 817, 818.

³ Under 53 G. 3, c. 141, now repealed by 17 & 18 V. c. 90.

⁴ *Molton v. Camroux*, 1849.

⁵ *Cave v. Mills*, 1862; *Skyring v. Greenwood*, 1825; *Shaw v. Picton*, 1825.

⁶ 3 St. Ev. 956. See *Rice v. Rice*, 1853; *Hunter v. Walters*, 1870. The usual acknowledgment in a policy of insurance of the receipt of premium from the assured is ac-

cordingly conclusive of the fact as between the underwriters and the assured, although not as between underwriters and brokers: *Dalzell v. Mair*, 1808 (Ld. Ellenborough); *De Gaminde v. Pigou*, 1812; *Anderson v. Thornton*, 1853 (Parke, B.).

⁷ *Ranken v. M'Murphy*, 1889 (Ir.).
⁸ 3 Sug. V. & P. 428, 10th edit.; and id. 611, 13th edit.; recognized by the court in *Sandys v. Hodgson*, 1839. See, also, *Ramsden v. Dyson*, 1865, H. L.; and *Doe v. Groves*, 1847; *Dixon v. Muckleston*, 1872 L. C.; *Re Lambert's Estate*, 1884, C. A. (Ir.).

⁹ *Pickard v. Sears*, 1837; *Gregg v. Wells*, 1839; *Coles v. Bk. of England*, 1839.

which purports to be transferable by delivery, deposit it with his broker or banker, he will be estopped, as against a bonâ fide holder for value, from denying that it was transferable.¹

§ 846. Further examples of the doctrine that where *both* parties have acted upon a state of facts assumed by mutual consent are as follow:—Trespass is not maintainable against a sheriff's officer who executes process against a man by a wrong name, either by taking his person, or seizing his goods, if before the process be sued out, he is asked his name, and gives such wrong one;² a party, who has entered into a bond by a wrong name, and is sued in that name, would be estopped from denying that the name in which he was sued was his real name.³ Where, on a compulsory reference, although the award was not made within the period limited by the statute, both parties have after the lapse of that period continued to attend before the arbitrator without objecting to his jurisdiction, the losing party is estopped from alleging that the time has not been enlarged, either by the court, or by the written consent of the parties;⁴ and where a judge, having tried a cause without a jury, with the consent of both parties who appeared before him, the unsuccessful party was not allowed afterwards to object that no written consent had been drawn up as the statute required.⁵

§ 847. Again, if the members of an incorporated company allow a solicitor to appear for them as defendants, and he consents to a reference, they cannot, after the award is made, object to the submission, on the ground that the solicitor had no authority under seal to defend or refer the cause;⁶ a judge's order which was bad

¹ *Goodwin v. Robarts*, 1876, H. L.; *Rumball v. Metrop. Bk.*, 1877.

² See *Dunston v. Paterson*, 1857; *Kelly v. Lawrence*, 1864; *Price v. Harwood*, 1811 (Ld. Ellenborough); cited and recognized (*Cresswell, J.*) in *Fisher v. Magnay*, 1843. See, also, *Reeves v. Slater*, 1827. As to a ca. sa., see *Morgans v. Bridges*, 1818, and *Magnay v. Fisher*, 1843, apparently overruling *Coote v. Leighworth*, 1596, and dictum (Ld. Hale) in *Thurbane et al.*, 1664, though in *Freeman v. Cooke*, 1848, Parke, B., intimated that it had always been

the opinion of the profession that *Coote v. Leighworth*, 1596, was law.

³ *R. v. Wooldale*, 1844 (*Wightman, J.*, citing *Maby v. Shepherd*, 1623, and *Hyckman v. Shotbolt*, 1567). See, also, 3 & 4 W. 4, c. 42, § 11, and *Williams v. Bryant*, 1839.

⁴ *Tyerman v. Smith*, 1856. See, also, *Haines v. E. India Co.*, 1856 (*Sir J. Patteson*), P. C.

⁵ *Andrewes v. Elliott*, 1856; 17 & 18 V. c. 125, § 1.

⁶ *Faviell v. East. Cos. Rail. Co.*, 1848.

as a proceeding under a now repealed Interpleader Act,¹ for want of a statement of consent upon its face, was nevertheless held to be conclusive upon the parties, as they had by their conduct agreed to submit the matter in dispute to the decision of the judge;² a lessor who, after giving notice to his lessee to do repairs within the period prescribed by the lease, so conducted himself as to lull the lessee asleep and to lead him to suppose that he might refrain from doing the repairs, was not allowed (although a mere parol licence to break such covenant will not justify a breach thereof^{2a}) to insist upon a covenant of forfeiture, on the ground that the repairs had not been finished within the time fixed for them;³ an action for forfeiture by breach of a covenant to insure on the tenant's part, qualified by an option given to the landlord to insure if the tenant made default, and to add the premiums to his rent, was allowed to be defeated by proof that the landlord had represented to the tenant that he had exercised the power, and had himself duly insured the premises;⁴ while a tenant who has paid rent, and acted as such, is not (as stated more fully in another place,⁵) permitted to set up a superior title of a third person against his lessor, since he derived possession from him as tenant, and therefore cannot be allowed to repudiate that relation.

§ 848. The doctrine of estoppel (or admission) by conduct is also applied to the respective relations of licensor and licensee, bailor and bailee, and principal and agent; it being clear that neither licensees, nor bailees, nor agents, can be permitted to dispute the respective titles of their licensors, bailors, or principals.⁶ Accordingly a licensee under a patentee is estopped from disputing the validity of the patent, so long as the licence continues in force;⁷ and a warehouseman, wharfinger, banker, solicitor, agent, or other depositary of goods or moneys (not being a mere pledgee) who has

¹ 1 & 2 W. 4, c. 58.

² *Harrison v. Wright*, 1845.

^{2a} *Doe v. Gladwin*, 1845; *West v. Blakeway*, 1841.

³ *Hughes v. Metrop. Rail. Co.*, 1877, H. L. But see *Kennedy v. Earl of Essex*, 1891 (Ir.); *Robinson v. Wakefield*, 1892 (Ir.).

⁴ *Doe v. Sutton*, 1841; explained by *Patteson, J.*, in *Doe v. Gladwin*, 1845; *Doe v. Rowe*, 1825. See ante, §§ 804—808.

⁵ Ante, §§ 101—103.

⁶ *Dixon v. Hamond*, 1819 (Abbott, C.J.); *Collett v. Hubbard*, 1846; *Zulueta v. Vinent*, 1851-2; *Phillips v. Hall*, 1832 (Am.); *Drown v. Smith*, 1825 (Am.); *Eastman v. Tuttle*, 1823 (Am.); *M'Neil v. Philip*, 1821 (Am.); *Chapman v. Searle*, 1825 (Am.); *Jewett v. Torrey*, 1814 (Am.); *Lyman v. Lyman*, 1814 (Am.).

⁷ *Crossley v. Dixon*, 1863, H. L.; *Clark v. Adie*, 1877, H. L.

once acknowledged a person's title, and agreed to hold goods or moneys subject to his order, or to sell goods and to account for the proceeds, will be estopped from setting up the title of a third person to the same goods or moneys, or from otherwise defeating the rights of his bailor or principal, against his own manifest obligations to him.¹ An exception to the general rule will, however, be allowed, where the bailment has been determined by what is equivalent to an eviction by title paramount,² and, also, where the bailor or principal has obtained the goods fraudulently or tortiously from the third person,³ provided the defendant in such last case can show, that he was unacquainted with the circumstances when he made the admission,⁴ and that such third person has actually made a claim to the goods or moneys in question.⁵ Perhaps the bailor's title might also be impugned, should the circumstances show that he, in connexion with some third person, had practised a fraud on the bailee, by representing goods to belong to the bailor, which, in fact, were the property of such third person, if proof were also given, that the defendant, in consequence of the fraudulent misrepresentation, had sustained any real injury.⁶

§ 849. Moreover, where a person *pledges* property to which he has no title, the pledgee is not estopped from delivering it to the rightful owner. For, on an ordinary pledge, the pledgor impliedly undertakes that the property is his own, and the pledgee merely undertakes that he will return it to the pledgor, provided it be not shown to belong to another.⁷ A common carrier, also, being bound to receive goods for carriage, and having no means of making inquiry as to their ownership, is at liberty to dispute the title of the person from whom he has received them; and may establish a

¹ Gosling *v.* Birnie, 1831; Woodley *v.* Coventry, 1863; Stonard *v.* Dunkin, 1810 (Ld. Ellenborough); Harman *v.* Anderson, 1809 (id.); Knights *v.* Wiffen, 1870; Hawes *v.* Watson, 1824; Dixon *v.* Hammond, 1819; Roberts *v.* Ogilby, 1821; Anon. (Gould, J.) (undated), recognised by Ld. Kenyon in Laclough *v.* Towle, 1800; Farrington *v.* Clerk, 1782; Holl *v.* Griffin, 1833; Nickolson *v.*

Knowles, 1820; Evans *v.* Nichol, 1841. See, however, Thorne *v.* Tilbury, 1858.

² Biddle *v.* Bond, 1865.

³ Hardman *v.* Wilcock, 1832; Biddle *v.* Bond, 1865.

⁴ Per Alderson, J., in Gosling *v.* Birnie, 1831; Ex parte Davies, Re Sadler, 1881.

⁵ Betteley *v.* Reid, 1843.

⁶ Scott *v.* Crawford, 1842.

⁷ Cheesman *v.* Exall, 1851.

defence by proving that he has delivered the goods to the real owner on his claiming them.¹ A vendor, however, who has sold goods to a party as a sole purchaser, and has directed his factors to weigh them over to such party, and to enter them in his name in their books, cannot, after such sale and transfer, dispute his title as sole proprietor, or detain the goods, on the authority of a third person, who claims to be a joint purchaser.²

§ 850. Further examples of conclusive admissions (or estoppels) by conduct arise in connection with bills of exchange. Thus, in an action against the acceptor, the defendant cannot show that his signature has been forged if he has accredited a bill, and induced the plaintiff to take it, by saying that it was his, and would be duly paid.³ Moreover, although at one time it was deemed law, that no consideration of estoppel as between the parties could have any weight where the rights of the *revenue* intervened; and that, consequently, the maker of a cheque payable to *bearer* on demand⁴ might defraud even a *bonâ fide* holder for value, by proving that the cheque was post-dated, and, as such, inadmissible in evidence without a bill stamp,⁵ this doctrine has now been repudiated.⁶ The law now is, that if a cheque,—whether payable to bearer or to order,—appears, when tendered in evidence, to bear on its face a sufficient stamp, the court will receive the document, and will not allow any proof to be given that it had actually been post-dated, and that the holder had taken it with knowledge of that fact.⁷

§ 851. The *acceptance* of a bill is, moreover, deemed a *conclusive admission*,⁸ as against the acceptor, of the signature of the drawer,⁹ and of his capacity to draw;¹⁰ and if the bill be payable to the order of the drawer, of his capacity to indorse;¹¹ and if it be drawn

¹ *Sheridan v. The New Quay Co.*, 1858.

² *Kieran v. Sandars*, 1837.

³ *Leach v. Buchanan*, 1803 (Ld. Ellenborough); recognized (Erskine, J.) in *Benson v. Collman*, 1842.

⁴ *Whistler v. Forster*, 1833; *Austin v. Bunyard*, 1865 (Cockburn, C.J.); *Bull v. O'Sullivan*, 1871.

⁵ *Field v. Woods*, 1837; recognized in *Steadman v. Duhamel*, 1845.

⁶ *Austin v. Bunyard*, 1865.

⁷ *Gatty v. Fry*, 1877; *Emanuel v.*

Roberts, 1868.

⁸ See 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 54.

⁹ *Sanderson v. Collman*, 1842; *Bass v. Clive*, 1815.

¹⁰ *Id.* See *Haly v. Lane*, 1741 (Ld. Hardwicke).

¹¹ *Taylor v. Croker*, 1803 (Ld. Ellenborough); *Pitt v. Chappelow*, 1841; *Drayton v. Dale*, 1823. All these cases were recognized by the court in *Sanderson v. Collman*, 1842. See, also, *Braithwaite v. Gardiner*,

C. IX.] WHAT ACCEPTOR OF BILL OF EXCHANGE ADMITS.

by procuration, of the authority of the agent to draw in the name of the principal.¹ In this respect it matters not whether the bill be drawn before or after the acceptance.² But the acceptance is not an admission on the part of the acceptor, either of the signature of the payee, though he be the same party as the drawer,³ or of that of any other indorser;⁴ and this, too, although, at the time of the acceptance, the indorsements were on the bill.⁵ Nor does it admit that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same;⁶ nor, where the bill has been drawn in the partnership name and made payable to the firm's order, does it estop the acceptor from showing that such bill was in fact not indorsed by the firm nor negotiated for any partnership purpose;⁷ nor does it if it be given on a bill payable to the order of the drawer on which the name of a real person as drawer and indorser is forged, if given in ignorance of the forgery, preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit.⁸ If, however, an acceptor, with knowledge of the forgery, puts the bill in circulation, he will be estopped by that conduct from disputing the validity of the indorsement equally with that of the drawing.⁹ And if a bill be drawn in a wholly fictitious name, and the handwriting of the indorsement be the same as that of the drawing, the acceptor will also be estopped from denying it, because he admits that the bill is drawn by somebody, that is, by the person who indorses in the same handwriting, and the fair construction to be put on his undertaking

1845, where, in an action by indorsee against acceptor, defendant was held estopped from pleading that the drawer and first indorser was an uncertificated bankrupt when the acceptance was given, and that his assignees had demanded payment. So, in a similar action, it was held that the defendant could not plead, under the old law, that the drawer and first indorser was a married woman from the date of the drawing down to the time of the indorsing of the bill: *Smith v. Marsack*, 1848. See ante, § 842.

¹ *Robinson v. Yarrow*, 1817; *Jones v. Turnour*, 1830 (Ld. Tenterden).

² *Schultz v. Astley*, 1836; *Hallifax v. Lyle*, 1849; *Lond. & S. West. Bk. v. Wentworth*, 1880. But see *Baxendale v. Bennett*, 1878, C. A.

³ *Forster v. Clements*, 1809; *Macferson v. Thoytes*, 1790; *Bosanquet v. Anderson*, 1806 (Lord Ellenborough); *Cooper v. Meyer*, 1830 (Ld. Tenterden).

⁴ Id.

⁵ *Smith v. Chester*, 1787; *Robarts v. Tucker*, 1851.

⁶ *Robinson v. Yarrow*, 1817; recognised in *Beeman v. Duck*, 1843.

⁷ *Garland v. Jacomb*, 1873.

⁸ *Beeman v. Duck*, 1843.

⁹ Id.

is, that he will pay to the signature of the same person who signed for the drawer.¹

§ 852. The difference which arises as regards their being estopped by their action between the position of a drawer and that of an indorser, who signs the bill before the acceptance, will have been noticed. The reasons usually assigned for this difference are, that an *acceptor* is only presumed to be acquainted with the handwriting of the drawer, and it consequently is sufficient if he ascertains that his signature is genuine; that he is not bound to look at the back of the bill at all; that, even if he were, he could not be supposed to know the handwriting of indorsers, who would probably be strangers to him; and that a different rule would raise nice questions of fact in every case as to whether the bill was indorsed before or after acceptance, and would consequently embarrass the circulation of negotiable securities, by rendering the position of acceptors hazardous and undefined.²

§ 853. By analogy with the law which estops an acceptor from disputing the genuineness of the drawing, the *indorsement* by the payee of a promissory note is a conclusive admission of the handwriting of the maker;³ and the indorsement of a bill of exchange will also operate as an estoppel on the indorser to deny any of the preceding signatures.⁴

§ 854. Having now fully discussed the effect of admissions which have been acted upon, we may point out that those admissions, which have *not* been acted upon either because *they were originally made without any intention of being acted upon*, or because for any other reason they, in fact, remain *not acted upon*, or have *not altered the situation of the opposite party*, are not conclusive, though they are receivable in evidence against the parties making them.⁵ Thus, if A. contracts to sell goods to B., and gives him a delivery order, he may, on B.'s bankruptcy, provided B. has

¹ *Cooper v. Meyer*, 1830 (Ld. Tenterden), explained and recognised by Parke, B., in *Beeman v. Duck*, 1843. See, also, *Ashpittel v. Bryan*, 1864; *Phillips v. Im Thurn*, 1866.

² See Story, Bills, § 263; *Robinson v. Yarrow*, 1817 (Park, J.); *Smith v. Chester*, 1787; *Canal Bk. v. Bk. of Albany*, 1841 (Am.).

³ *Free v. Hawkins*, 1817 (Gibbs, C.J.).

⁴ 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 55.

⁵ See *Howard v. Hudson*, 1853; *White v. Greenish*, 1861; *Foster v. Mentor Life Assur. Co.*, 1854; *Carr v. Lond. & N. West. Rail. Co.*, 1875; *Coventry v. Gt. East. Rail. Co.*, 1883.

neither paid for them, nor sold them to a third party, show that the delivery order was invalid, and therefore did not amount to a constructive delivery of the goods;¹ the court will not treat the alteration of its locality, after complaint, as conclusive evidence that a trade was a nuisance;² nor will it, in a petition for damages by reason of adultery,³ regard an admission by the defendant that at some other and different time the "*teterrima causa*" was the wife of the plaintiff as conclusive evidence that she was the wife of the plaintiff at the time when the adultery was committed;⁴ a sheriff's return, though conclusive, in the particular cause in which it is made, or for the purposes of an attachment, does not, in any other action or proceeding, operate as an estoppel, either against the sheriff or against his bailiff;⁵ a creditor is not estopped from bringing an action against a sheriff for a false return, by accepting the amount levied on account and towards the satisfaction of the debt mentioned in the writ;⁶ and a person who brought an action of trover for a dog, was held not to be precluded from proving his title to it, though he had previously authorised a third party (against whom the defendant had brought an action) to deliver it to the defendant, at the same time demanding it back on behalf of the plaintiff as being the latter's property.⁷ In these,⁸ and the like cases,⁹ no wrong is done to the other party, by receiving any legal evidence to show that the admission was erroneous, and by leaving the whole evidence, including the admission, to be weighed by the jury.

§ 855. The doctrine that a person is not estopped by representations which were not intended to be acted upon, or have in fact not been acted upon, has in one case been extended to cases in which the representations were such that they *ought not* to have been acted upon. In an action against a sheriff for seizing the

¹ *Lackington v. Atherton*, 1844.

² *R. v. Neville*, 1791 (Ld. Kenyon).

³ See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

⁴ *Morris v. Miller*, 1767; further explained in *Rigg v. Curgenven*, 1769.

⁵ *Standish v. Ross*, 1849; *Brydges v. Walford*, 1817; *Jackson v. Hill*,

1839; *Remmett v. Lawrence*, 1850; *Levy v. Hale*, 1849; *Stimson v. Farnham*, 1871.

⁶ *Holmes v. Clifton*, 1839, overruling *Beynon v. Garrat*, 1824.

⁷ *Sandys v. Hodgson*, 1839.

⁸ Gr. Ev. § 209, four lines.

⁹ See ante, §§ 804—808. See, also, *Machu v. Lond. & S. West. Rail. Co.*, 1848; *Greenish v. White*, 1861.

plaintiff's goods under an execution against his brother, where the plaintiff, fearing an execution, had removed his goods to the brother's house, and when the sheriff's officer came there had (erroneously supposing that the writ was against himself) warned the officer not to seize the goods, as they belonged to his brother, but on the officer producing a writ against the brother, before the goods were actually seized, told him that such goods were the property of a third party, and the officer, disregarding this last statement, seized and sold the goods, as belonging to the brother; the jury having found that the goods were the plaintiff's, but that, before the seizure, he had falsely stated to the officer that they belonged to his brother, and that the officer was thereby induced to seize them as his brother's, a verdict was entered for the plaintiff, on the grounds, first, that the plaintiff did not intend to induce the officer to seize the goods as those of the brother; and next, that no reasonable man would have seized the goods on the faith of the plaintiff's representations *taken altogether*.¹

§ 856.² Admissions have also been held conclusive on grounds of *public policy* in some few cases connected with public justice and government. For instance, in an action for penalties for election bribery, a man who had given money to another for his vote is not permitted to say that such latter had no right to vote;³ where the owners of a stage coach took up more passengers than allowed, and an injury was alleged as having arisen from overloading, their conduct was held to be conclusive evidence that the accident was occasioned by the cause assigned;⁴ one who has officiously intermeddled with the goods of another recently deceased, is, in favour of creditors, estopped from denying that he is executor;⁵ an executrix who treats the goods of her testator as the property of her husband, will not be allowed to object to their being taken in execution for her husband's debt;⁶ where a statute made it illegal to publish reports of the meetings of suppressed associations, a report stating that a suppressed association had held a meeting and purporting to report the proceedings at that meeting, was

¹ Freeman v. Cooke, 1848.

² Gr. Ev. § 210, in part.

³ Combe v. Pitt, 1764; Rigg v. Curgenven, 1769.

⁴ Israel v. Clark, 103 (Ld. Kenyon, recognised by Ld. Ellenborough).

⁵ Reade's case, 1604-5.

⁶ Quick v. Staines, 1798. See Fenwick v. Laycock, 1841.

held, even in a criminal case, to be an admission that such a meeting had in fact taken place;¹ and a shipowner, whose ship after being forfeited for breach of the revenue laws, had been given up to him on making an application, verified by oath, that the forfeiture had been incurred by the master ignorantly and without fraud, was not permitted afterwards, in an action by the latter against himself for wages on the same voyage, to gainsay this statement, and to prove the misconduct of the master, even on proving that the fraud had come to his knowledge subsequently.²

§ 857.³ Moreover, an admission is not rendered conclusive against the party by the mere fact that it was made under oath; though this circumstance greatly adds to its weight and throws upon the party the burthen of showing that it was made under a mistake which was both innocent and is perfectly clear. Thus, in a prosecution under the game laws, proof of the defendant's oath, under an Income Act then in force, that the yearly value of his estate was less than 100%, was held not quite conclusive against him, though very strong evidence of the fact.⁴ The same principle is applied where the fact sworn to was not, as it might be considered in the above case, a matter of judgment, but was purely a matter of fact within the knowledge of the party swearing.⁵ The defendant's belief of a fact, sworn to in an old answer in Chancery, is also admissible evidence against him, but not conclusive.⁶

§ 858.⁷ Admissions *in deeds* have already been considered in regard to parties and privies,⁸ between whom they are generally

¹ Reg. v. Sullivan, 1887 (Ir.).

² Freeman v. Walker, 1829 (Am.). But a sworn entry at the custom-house of certain premises, as being rented by A., B., and C., as partners, for the sale of beer, though conclusive in favour of the Crown, is not conclusive evidence of the partnership, in a civil suit, in favour of a stranger. Ellis v. Watson, 1818. The difference between this case and that in the text may be that, in the latter, the owner gained an advantage to himself, which was not the case in the entry of partnership; it being only incidental to the principal object, namely, the designation of the place where an exciseable commodity

was sold.

³ Gr. Ev. § 210, in part.

⁴ R. v. Clarke, 1799.

⁵ Thornes v. White, 1835.

⁶ Doe v. Steel, 1811 (Ld. Ellenborough). Statements of fact contained in answers in Chancery were at common law always admissible against the party; but not strictly conclusive, merely because they were sworn to. See B. N. P. 236, 237; Cameron v. Lightfoot, 1777; Grant v. Jackson, 1793; Studdy v. Sanders, 1823; De Whelpdale v. Milburn, 1818. Cf. infra, note ¹², § 859.

⁷ Gr. Ev. § 211, in great part.

⁸ Ante, §§ 91—100.

regarded as estoppels, if properly pleaded.¹ Such admissions, even when not technically estoppels, are entitled to great weight, from the solemnity of their nature.² When, however, they are offered in evidence by a stranger, the adverse party may repel their effect, in the same manner as though they were only parol admissions.³

§ 859.⁴ Various other admissions, even when they are in writing, are not conclusive if they have never been acted upon by another to his prejudice, nor fall within the reasons before mentioned for estopping the party against gainsaying them. Such admissions are left to be weighed with other evidence by the jury. *Receipts*, mere acknowledgments, either for goods or money, and whether on separate papers,⁵ or indorsed on deeds,⁶ or on negotiable securities,⁷ are of this nature, as are also bankers' *pass-books*;⁸ an *adjustment of a loss* on a policy of insurance, which has been made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances;⁹ and so, too, are *accounts rendered*, such as a solicitor's bill,¹⁰ and the like.¹¹ An old bill in Chancery is not admissible at all against the plaintiff in proof of the *admissions* it contains, since the facts stated therein are regarded as nothing more than the mere suggestions of counsel.¹²

§ 860. An *inventory* of the personal estate of a deceased person, exhibited by a personal representative on the citation of a person interested, either in the Ecclesiastical Court under the old law, or

¹ Fishmongers' Co. v. Robertson, 1843; Bowman v. Rostrom, 1834.

² Doe v. Stone, 1846.

³ R. v. Neville, 1791; Woodward v. Larking, 1801; May. of Carlisle v. Blamire, 1807.

⁴ Gr. Ev. § 212, in great part.

⁵ Skaife v. Jackson, 1824; Farrar v. Hutchinson, 1839; Wallace v. Kellsall, 1840 (Parke, B.); Bowes v. Foster, 1858 (Martin, B.); Lee v. Lanc. & Yorks. Rail. Co., 1871. These cases have virtually overruled Alner v. George, 1808. For American cases, see Harden v. Gordon, 1823; Fuller v. Crittenden, 1832; Ensign v. Webster, 1799; Putnam v. Lewis, 1811; Stackpole v. Arnold, 1814; Tucker v. Maxwell, 1814;

Williamson v. Scott, 1821.

⁶ Straton v. Rastall, 1788; Lampon v. Corke, 1822 (Holroyd and Best, JJ.). As to cases where the receipt of money is mentioned in the deed itself, see ante, § 96.

⁷ Graves v. Key, 1832.

⁸ Commercial Bk. of Scotland v. Rhind, 1860, H. L.

⁹ Luckie v. Bushby, 1853; Reyner v. Hall, 1813; Shepherd v. Chewter, 1808; Adams v. Sanders, 1829; Christian v. Coombe, 1796.

¹⁰ Loveridge v. Botham, 1797.

¹¹ See Bacon v. Chesney, 1816; Dawson v. Remnant, 1806.

¹² Boileau v. Rutlin, 1848; Doe v. Sybourn, 1796 (Id. Kenyon); cf. supra, note ⁶ to § 857.

C. IX.] INVENTORY, HOW FAR AN ADMISSION OF ASSETS.

in the Probate Division of the High Court under the new law,¹ being sworn to by the exhibitant, will be *primâ facie* evidence of assets; and so also will a *declaration* of the personalty of a testator or intestate, which has been made on oath by his representative before a final settlement of accounts,² and since the 1st of June, 1881, an affidavit received by the Commissioners of Inland Revenue from any person applying for probate or letters of administration, verifying the account of the deceased's estate or effects;³ and the executor or administrator, if he has pleaded *plene administravit*, will be forced to show, either the non-existence of such assets, or that they have not reached his hands, or that they have been duly administered;⁴ and perhaps in the case last named the affidavit will even be sufficient proof that such assets have been realized in due course.⁵ An old probate stamp,⁶ though slight evidence of assets to the amount covered thereby, was not alone sufficient to throw upon executors the burthen of proving the non-receipt of such assets.⁷ Coupled, however, with proof, either of long acquiescence in the payment of the duty, or of other suspicious circumstances, it furnished a presumption of assets received, which executors found it difficult to rebut.⁸

§ 861.⁹ Evidence of *oral admissions* ought always to be received *with great caution*.¹⁰ Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his

¹ 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), as amended by "The Statute Law Revision Act, 1892." (55 & 56 V. c. 19); Rules of 1862 for Ct. of Prob. in contentious business, r. 76, and Form No. 27.

² See Rules of 1862 for Reg. of Ct. of Prob. in non-contentious business, Form No. 18; and Rules for Dist. Reg. of Ct. of Prob., Form No. 18, and cases cited in note ⁴, *infra*.

³ 44 V. c. 12 ("The Customs and Inland Revenue Act, 1881"), §§ 27—29. This law has prevailed in Ireland for some years past. See *Rowan v. Jebb*, 1846 (Ir.).

⁴ *Giles v. Dyson*, 1815, explained in *Stearn v. Mills*, 1833; *Parsons v. Hancock*, 1829 (Parke, J.); *Hickey v. Hayter*, 1795; *Young v. Cawdrey*,

1819. See *Hutton v. Rossiter*, 1854-5.

⁵ 44 V. c. 12, § 31. To understand the new law respecting probate and legacy duty, and duties on accounts, see, and study, 44 V. c. 12, §§ 26—43.

⁶ An affidavit stamp is now substituted for the probate stamp. See 44 V. c. 12, § 27.

⁷ *Mann v. Lang*, 1835; *Stearn v. Mills*, 1833. These cases overrule *Foster v. Blakelock*, 1826.

⁸ *Mann v. Lang*, 1835 (Ld. Denman); *Curtis v. Hunt*, 1824 (Ld. Tenterden); *Rowan v. Jebb*, 1846 (Ir.); *Lazenby v. Rawson*, 1854 (Ld. Cranworth).

⁹ Gr. Ev. § 200, in part.

¹⁰ See post, § 862.

meaning,¹ or the witness may have misunderstood him,² or may purposely misquote the expressions used.³ It also sometimes happens, that the witness, by unintentionally altering a few words, will give an effect to the statement completely at variance with what the party actually said.⁴ But where the admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.⁵

¹ See Gospel of St. John, ch. 21, vv. 21—23.

² See St. Matthew, ch. 27, vv. 46, 47.

³ See, and compare, St. John, ch. 2, vv. 18—21, and St. Matthew, ch. 26, vv. 60, 61.

⁴ Ante, § 216, n. 3. Alciatus expresses the sense of the civilians to the same effect, where, after speaking of the weight of a judicial admission, “propter majorem certi-

tudinem, quam in se habet,” he adds: “Quæ ratio non habet locum quando ista confessio probaretur per testes; imo est *minus certa cæteris probationibus*,” &c.: Alciat. de Præs., Pars. 2, Col. 682, n. 6. See Poth. Obl. App. No. 16, § 13; Lench v. Lench, 1805.

⁵ Rigg v. Curgenvy, 1769; Glassf. Ev. 356; Com. v. Knapp, 1830 (Am.) (Putnam, J.). As to *Admissions* by *Agents*, see ante, §§ 602—605.

AMERICAN NOTES.

Admissions. — As stated in the text (§ 723), an admission, in the law of evidence is rather a *levamen probationis* than a *probatio*; — a fact to be proved by evidence than evidence to prove a fact. In popular acceptance, an “admission” is a statement made by a party against his interest. Such is not the legal meaning of the phrase. A rule of procedure prescribes that no proof need be offered of a relevant fact which the other side has stated. It is, so to speak, one of the rules of the game; — analogous to that which exempted a party under common law pleading from the necessity of proving a fact not denied by his opponent. The statement of the relevant fact may have seemed highly favourable to the interest of the declarant at the time it was made. It is competent evidence, notwithstanding. It is naturally to be inferred from the circumstance that the statement has become relevant to the cause of the opposite side that, in many instances, the declaration as made is really against the interest of the declarant. But the statement is not rendered competent by this fact. It is admissible because the other side made it. *Powell v. Tarry*, 77 Va. 250 (1883); *Potter v. Mellin*, 41 Minn. 487 (1889); *Goodnow v. Parsons*, 36 Vt. 46 (1863); *Robinson v. Stuart*, 68 Me. 61 (1878); *Crowe v. Colbeth*, 63 Wis. 643 (1885); *Com. v. Gay*, 162 Mass. 458 (1894); “The admissions of a party, if material to the issue, are always competent.” *Mears v. Cornwall*, 73 Mich. 78 (1888). Where part of a conversation, claimed to amount to an admission, is given by one side, the remainder of the conversation modifying the part given in evidence may be called for by the other side, though consisting, in part, of declarations in the declarant’s favor. *Williams v. Mower*, 29 S. C. 332 (1888). “Where an admission against interest is offered in evidence, it must be taken together as a whole. The triers of the fact may give credence to that part only which is against the interest of the declarant, but the court cannot reject that part which is in the declarant’s favor as having no probative force.” *Hormann v. Wirtel*, 59 Mo. App. 646 (1894). “It is a wholesome rule, that where part of what a man says is used to charge him, he is entitled to the balance of what he said to discharge himself.” *Steele v. Wood*, 78 N. C. 365 (1878).

The interest may be proprietary; as the admission of a tenant as to the character and extent of his tenancy. *Secor v. Pestana*, 37 Ill. 525 (1865); *Plummer v. Carrier*, 52 N. H. 287 (1872).

FORM OF DECLARATION. — The form in which an admission is made is immaterial, so far as its competency is concerned. Various obvious considerations, arising from the circumstances under which, or the form in which, such an admission may affect the weight to be attached to it.

An admission may be contained in a deposition, though "the caption might have been irregular or even unjustifiable." *Carr v. Griffin*, 44 N. H. 510 (1863). Or in an affidavit filed in court on removal of a case. *Baker v. Hess*, 53 Ill. App. 473 (1893). Admissions made in the defendant's answer in another case have been held competent. *Printup v. Patton*, 91 Ga. 422 (1893); *Radclyffe v. Barton*, 161 Mass. 327 (1894). It may consist of evidence given in a former trial, and is competent in this form even if the declarant is present in court and can be called as a witness. *Buddee v. Spangler*, 12 Col. 216 (1888); *McAndrews v. Santee*, 57 Barb. 193 (1869); *Lorenzana v. Camarillo*, 45 Cal. 125 (1872); *Woods v. Gevecke*, 28 Ia. 561 (1870); *German Nat. Bank v. Leonard*, 40 Neb. 676 (1894). Such suit need not have been between the same parties. *Tooker v. Gormer*, 2 Hilt. 71 (1858).

If evidence, itself incompetent as an admission, is read over and assented to by a defendant, it becomes competent as his admission. *Beeckman v. Montgomery*, 14 N. J. Eq. 106 (1861).

On an issue as to the value of certain premises taken by a railroad, evidence is competent of the plaintiff's declarations, as to its value, of an offer to sell it at a certain price and of his sale of a portion of it at a certain price. *East Brandywine &c. R. R. v. Ranck*, 78 Pa. St. 454 (1875).

The admission may take the form of an entry upon an account book. *McNutt v. McDonald*, 3 Nova Scotia, 175 (1873); *Robert's Appeal*, 126 Pa. St. 102 (1889).

An admission may be contained in a common law pleading. *Soaps v. Eichburg*, 42 Ill. App. 375 (1891).

It is not objectionable that an admission is contained in an instrument which is legally inoperative as to its own intended effect. The admission is still competent. *Hickey v. Hinsdale*, 12 Mich. 99 (1863); *Reis v. Hellman*, 25 Oh. St. 180 (1874).

So a written promise made on Sunday, to pay a debt, while invalid as a new promise, is competent as an admission of the existence of the debt. *Ayres v. Bane*, 39 Ia. 518 (1874).

So an admission contained in a sealed instrument executed by an agent who has merely a parol authority, may still bind the principal. *Morrell v. Cawley*, 17 Abb. Prac. 76 (1863). So of an admission contained in an instrument executed by an agent without authority. *Huffman v. Cartwright*, 44 Tex. 296 (1875).

Admissions may relate to the contents of a written document. *Loomis v. Wadhams*, 8 Gray, 557 (1857); *Taylor v. Peck*, 21 Gratt. 11 (1871); *Denver &c. R. R. v. Wilson*, 4 Col. App. 355 (1894). Or even of a record. *Smith v. Palmer*, 6 Cush. 513 (1850).

To the contrary, see *Jameson v. Conway*, 10 Ill. 227 (1848). *Threadgill v. White*, 11 Ired. Law, 591 (1850). The contents of a record cannot be proved by an admission. *Smith v. Palmer*, 6 Cush.

513 (1850). They may enure to the benefit of one not a party to the litigation. *Burleson v. Goodman*, 32 Tex. 229 (1869). They may be used to prove a book account. *Bonnell v. Mawha*, 37 N. J. L. 198 (1874).

FORCE OF ADMISSIONS. — The weight to be attached to admissions has been variously stated by different courts. In *Pence v. Makepeace*, 65 Ind. 345, 365 (1879) the following charge to the jury was approved by the supreme court of Indiana. "Verbal admissions or statements, consisting of mere repetitions of oral statements made some time ago, are subject to much imperfection and mistake, for the reason that the party making them may not have expressed his or her own meaning, or the witness may have misunderstood him or her, or, by not giving their exact language, may have changed the meaning of what was said; such evidence should, therefore, be received by the jury with great caution. But admissions deliberately made, and well understood, are entitled to your consideration, especially when made against a party's own interest." *Pence v. Makepeace*, 65 Ind. 345, 365 (1879).

"We do not think that admissions by parties are to be regarded as an inferior kind of evidence; for, on the contrary, when satisfactorily proven, they constitute a ground of belief on which the mind justly reposes with strong confidence." *Ector v. Welsh*, 29 Ga. 443, 450 (1859).

"The following instruction was proposed on behalf of the defendant, and refused: 'Admissions not being under oath, and liable to be misunderstood, as against sworn testimony, are considered very feeble evidence, unless fully corroborated. The instruction was properly refused. When a deliberate admission of a party against his own interest is satisfactorily proved, it is not necessarily feeble evidence, and does not require corroboration. It may be that the instruction was intended to refer to the proof of admissions, and not to the admissions themselves. Conceding that the instruction admits of that interpretation, we still think it was properly refused. The weight to be given to testimony of mere admissions is to be determined by the jury; yet it may be proper for the court to say to the jury that such testimony is usually unsatisfactory and should be received with great caution. But it would scarcely be correct to say in every case, without qualification or exception, that it is very feeble testimony unless fully corroborated; for cases may readily be supposed, where an admission might be satisfactorily proved by the uncorroborated testimony of a single witness.'" *Saveland v. Green*, 40 Wis. 431, 444 (1876).

It has even been held that where admissions are not denied or controlled they "must be taken as true." *Robinson v. Stuart*, 68 Me. 61 (1878).

The probative force of admissions is naturally increased where the declarant was aware that the statement was against his interest.

TO WHOM MADE. — Declarations may be made to any one. "There is no rule of law requiring such admissions to be made to the party or his agent." *Secor v. Pestana*, 37 Ill. 525 (1865).

PRIVITY. — Under certain circumstances, the admissions of one person bind another equally as if made by himself. These circumstances substantially vary with the rules of positive or substantive law regulating the particular relationship existing between the declarant and the person claimed to be bound by his declaration. Whether, for example, the declaration of an agent binds his principal is a question in the law of agency. Whether sufficient privity exists between A. and his predecessor in title that A. is bound or affected by a statement made by the previous owner while in the possession of the property in question is to be decided by the law of property. When the rules of substantive law prescribe that certain of A.'s admissions may be taken to be those of B., the ordinary rules of evidence admitting B.'s admissions are applied.

ADMISSION BY SILENCE. — The rule regarding admission has been so far extended in many of the states of the American Union as to consider competent the fact that certain statements of relevant facts have been made under circumstances calling for denial if untrue, in the presence of the opposing party, and that he has not denied them. *Corser v. Paul*, 41 N. H. 24 (1860); *Johnson v. Day*, 78 Me. 224 (1886); *Humes v. O'Bryan*, 74 Ala. 64 (1883); *Evans v. Montgomery*, 95 Mich. 497 (1893); *Des Moines Savings Bank v. Colfax Hotel Co.*, 88 Ia. 4 (1893); *Wisdom v. Reeves* (Ala.), 18 So. Rep. 13 (1895). So where repeated interviews took place between the plaintiff and the officers of a defendant corporation, it is competent to show that the latter made no pretence that the defendant was not liable. *Proctor v. Old Colony R. R.*, 154 Mass. 251 (1891). "It is somewhat like an omission to testify, or to produce books, or to furnish explanations, when called on to do so." *Proctor v. Old Colony R. R.*, 154 Mass. 251 (1891). By a parity of reasoning, "The omission of a party to reply to statements in a letter about which he has knowledge, and which if not true he would naturally deny, when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true." *Fenno v. Weston*, 31 Vt. 345, 352 (1858).

But a mere failure to answer a letter does not make its statements competent as admissions by silence. *Learned v. Tillotson*, 97 N. Y. 1 (1884); *Thomas v. Gage*, 141 N. Y. 506 (1894); *St. Louis, &c. R. R. v. Thomas*, 85 Ill. 464 (1877); *Meguire v. Corwine*, 3 McArthur, 81 (1879); *Waring v. U. S. Telegraph Co.*, 44 Howard's (N. Y.) Prac. 69 (1873). The rule obtains in criminal cases. "A statement is made either to a man, or within his hearing, that he was concerned in the commission of a crime, to which he makes no reply; the natural inference is that the imputation is well founded, or he

would have repelled it." *State v. Reed*, 62 Me. 129, 142 (1874); *Conway v. State*, 118 Ind. 482 (1888); *State v. Crockett*, 82 N. C. 599 (1880); *Ettinger v. Com.*, 98 Pa. St. 338, 345 (1881); *Miller v. State*, 68 Miss. 221 (1890); *Garrett v. State*, 76 Ala. 18 (1884). Where the defendant's wife in his presence exclaimed, "We will sell liquor in spite of all the officers of station 1," the defendant's failure to deny the statement was held "some evidence of an admission on his part, if the declaration was understood by him in the sense first mentioned (that husband and wife were engaged in selling liquor), and if the circumstances were such that according to human experience he naturally would have repudiated it, if the implied assertions were not true." *Com. v. Funai*, 146 Mass. 570 (1888). The rule has been applied not only to the defendant in a criminal case, but to the prosecuting witness. *State v. Burton*, 94 N. C. 947 (1886).

A NECESSARY QUALIFICATION. — To render an unchallenged declaration made in a person's presence evidence against him, it is essential that he be in a position to reply, if so minded. "If a party is so situated that he is not called upon to say anything, and does not say anything, his silence under such circumstances is not to be taken as furnishing any ground for an inference that he thereby made any admission." *Proctor v. Old Colony R. R.*, 154 Mass. 251 (1891); *Corser v. Paul*, 41 N. H. 24 (1860); *Gibney v. Marchay*, 34 N. Y. 301, 305 (1866); *Loggins v. State*, 8 Tex. App. 434, 444 (1880); *Kaelin v. Com.*, 84 Ky. 354, 367 (1886); *Peck v. Ryan* (Ala.), 17 So. Rep. 733 (1895). It has been held by the supreme court of Georgia that uncontroverted statements made in presence of a party are incompetent, "unless it was at a time and under circumstances when it was his duty to speak." *Giles v. Vandiver*, 91 Ga. 192 (1892). Thus where, in the course of previous judicial proceedings, a statement is made in the presence of the defendant, as he is not at liberty to interpose when and how he pleases, though a party, no inference can be drawn, in a subsequent civil action, from the former silence. *Johnson v. Holliday*, 79 Ind. 151 (1881); *McElmurray v. Turner*, 86 Ga. 215 (1890); *Broyles v. State*, 47 Ind. 251 (1874). So the defendant, not being at liberty to interrupt the taking of a deposition of a witness by a magistrate, is not affected by his failure to deny a statement contained in such deposition, though made in his presence. *Tobacco Co. v. McElwee*, 96 N. C. 71 (1887). So where a defendant attended a certain interview on condition that he would "let the old man say what he pleased," no inference of an admission can be drawn from his silence under accusation by the person referred to. *Slattery v. People*, 76 Ill. 217 (1875). "The defendant is not called upon to dispute the account on every occasion, and care should be exercised in determining whether the circumstances called for it, so as to cause his omission to have weight

against him." *Churchill v. Fulliam*, 8 Ia. 45 (1859); *Huston's Estate*, 167 Pa. St. 217 (1895). A plaintiff who has been seen examining the defendant's books of account without objection has not thereby furnished evidence that he has admitted the correctness of certain payments therein contained. *Cheney v. Cheney*, 162 Mass. 591 (1895).

A married woman is not required to object, under penalty of acquiescence, during a conversation held with her husband, nor when, just before the death of her husband, when he could scarcely hear or speak, she, as the medium of communication between him and another person, repeated similar expressions without contradiction. "The interview was with her husband, not with her; it does not appear that she was inquired of in the matter. If she was not called upon to speak, was not inquired of, and made no response, then there was no such acquiescence as would bind her, nor justify the master in finding from her silence any admission of the truth of Nathan's statements. Whether a person is bound to speak when statements and declarations adverse to his interests are made, is often a perplexing question, and it is difficult to state a rule applicable to all cases, as the question so often depends upon the circumstances attending each case. It has often been before our courts and the rule deducible from the cases seems to be this, evidence that a party remained silent when declarations adverse to his interests are made in his hearing and presence, may be heard by the trier when the occasion upon which the declaration is made calls for admission or denial on his part. In other words, whenever he is called upon to speak; whenever the circumstances demand a reply." *Pierce v. Pierce*, 66 Vt. 369, 375 (1894).

A minister cannot be allowed to prove his contract with a religious society by reading extracts from a sermon preached by him in their church, to the terms of which no open contradiction was made. It was held to have been "made under circumstances which could hardly require or admit a contradiction or disclaimer." *Johnson v. Trinity Church Society*, 11 All. 123 (1865). So where the statement, though made in the presence of a party, is made when he is unable properly to understand or reply to it, no admission is implied. A statement is incompetent if made in the presence of a person asleep. *Lanergan v. People*, 39 N. Y. 39 (1868). Or if made in presence of a person so far under the influence of intoxication as not to understand what is said, — a question of fact which may be left to the jury. *State v. Perkins*, 3 Hawkes, 377 (1824). So statements made in the presence of a deaf person are mere hearsay. *Tufts v. Charlestown*, 4 Gray, 537 (1855). Where a defendant is under arrest, no inference can be drawn from his failure to answer charges made in his presence. *State v. Howard*, 102 Mo. 142 (1890). It naturally follows that where silence is due to absence of information no

inference can legitimately be drawn. "The silence of the party, even where the declarations are addressed to himself, is worth very little, as evidence, unless where he had the means of knowing the truth or falsehood of the statement." *Corser v. Paul*, 41 N. H. 24 (1860).

So where the silence comes from the fact that the statement is not heard, no admission can be predicated on it. *Cabiness v. Holland* (Tex. Civ. App.), 30 So. W. 63 (1895). "This kind of evidence should always be received with caution." *Corser v. Paul*, 41 N. H. 24 (1860). Whether the circumstances are such as to call for a reply is said to be a preliminary question for the courts. *Pierce v. Pierce*, 66 Vt. 369 (1894).

COMPROMISE NEGOTIATIONS. — The prevailing opinion in the United States is to the effect that offers made in the course of compromise negotiations are not competent as admissions. *Harrington v. Inhabitants of Lincoln*, 4 Gray, 563 (1855); *Molyneaux v. Collier*, 13 Ga. 406 (1853); *Commissioners v. Verbarg*, 63 Ind. 107 (1878); *Daniels v. Woonsocket*, 11 R. I. 4 (1874); *Louisville &c. R. R. v. Wright*, 115 Ind. 378 (1888); *Montgomery v. Allen*, 84 Mich. 656 (1891); *Pelton v. Schmidt*, (Mich.) 62 N. W. 552 (1895); *Smith v. Shell*, 82 Mo. 215 (1884); *Kierstead v. Brown*, 23 Neb. 595, 611 (1888); *Smith v. Satterlee*, 130 N. Y. 677 (1891); *International &c. R. R. v. Ragsdale*, 67 Tex. 24 (1886); *Home Insurance Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 548 (1876); *Perkins v. Concord R. R.*, 44 N. H. 223 (1862); *Draper v. Inhabitants of Hatfield*, 124 Mass. 53 (1878); *Wrege v. Westcott*, 30 N. J. Law, 212 (1862); *Arthur v. James*, 28 Pa. St. 236 (1857); *Barker v. Bushnell*, 75 Ill. 220 (1874); *Richards v. Noyes*, 44 Wis. 609 (1878); *Reynolds v. Manning*, 15 Md. 510, 526 (1859); *Darby v. Roberts*, 3 Tex. Civ. App. 427 (1893); *Olson v. Peterson*, 33 Neb. 358 (1891); *Huetteman v. Viesselmann*, 48 Mo. App. 582 (1892); *Gorham v. Auerswald*, 59 Mo. App. 77 (1894); *Collier v. Coggins*, 15 So. Rep. 578 (Ala.) (1894); *Columbia Planing Mill v. Ins. Co.*, 59 Mo. App. 204 (1894); *Fowles v. Allen*, 64 Conn. 350 (1894).

"The facts attempted to be proved by plaintiffs are not facts admitting a distinct liability, but were proposals that occurred in the conversation or negotiations to effect a settlement of the claim. This evidence was, therefore, properly rejected." *Chaffe v. Mackenzie*, 43 Ia. Ann. 1062 (1891).

Where the offer of settlement is not for the sake of peace but for another consideration *e. g.* the continuance of the case for three weeks, the offer is competent evidence of liability. *Clapp v. Foster*, 34 Vt. 580 (1861). Where an offer was made, "without prejudice" to a party claiming to have been injured in a railroad collision that if he would submit himself to treatment by certain doctors the company would settle by their report, the offer being

expressly made for the purpose of being used, if not accepted, at the trial as evidence of bad faith on the part of the plaintiff, it was held that the entire offer was competent evidence for the jury at the instance of the plaintiff. *Clark v. Grand Trunk*, 29 Q. B. U. C. 136 (1869).

A mere offer to pay, not made on the faith of any pending treaty of settlement is of course competent. *Smith v. Whittier*, 95 Cal. 279 (1892); *Molyneaux v. Collier*, 13 Ga. 406 (1853). *State v. Bruce*, 33 La. Ann. 186 (1881). So of an offer to pay if a survey shall show the existence of a trespass. *Ashlock v. Linder*, 50 Ill. 169 (1869). The fact that an offer of settlement of a contested insurance loss has been made is competent though "dangerously near transgressing the settled rule that offers of compromise are not admissible" where the offer is not received as evidence of the plaintiff's claim but solely on the question of waiver of the requirement of proofs of loss within a limited period. *Gould v. Insurance Co.*, 134 Pa. St. 570, 589 (1890).

Where an amount is fixed arbitrarily, as being what a person is willing to pay rather than have a suit, "the rule is well settled that no advantage can be taken of offers made by way of compromise; that a party may, with impunity, attempt to buy his peace." *Tenant v. Dudley*, 144 N. Y. 504 (1895).

So where a defendant, whose horse had run away and injured the plaintiff's horse, said to the plaintiff that "it was an accident and accidents would happen, but he would do what was right about it; that he would pay the veterinary surgeon's bill and would let the plaintiff have the use of a horse while the injured horse was laid up," the statement is said to be "to some extent an admission." *Bassett v. Shares*, 63 Conn. 39, 44 (1893). "An offer of payment, whether accepted or rejected, is evidence when the party making it understood it to be, and made it as, an admission of his liability. It is not evidence when he made it for the purpose of averting litigation, not intending to admit his liability." This question is one of fact for the court. *Colburn v. Groton*, 66 N. H. 151 (1889).

The Canadian practice places more insistence upon the formal use of the phrase "without prejudice" than is usual in the United States. *Pirie v. Wyld*, 11 Ont. 422 (1886); *Clark v. Grand Trunk R. R.*, 29 Q. B. U. C. 136 (1869); *Burns v. Kerr*, 13 Q. B. U. C. 468 (1856).

It is believed that the following statement, indorsed by the court of appeals of the state of Maryland in *Reynolds v. Manning*, 15 Md. 510, 527 (1859), is correct at the present day; "The most, if not all, of the American cases have . . . gone on the intrinsic character of the transaction, without requiring an express declaration that the communication should be without prejudice."

It has been held by the supreme judicial court of Maine that

when evidence is objected to on the ground that it is a statement made in course of an effort to compromise a dispute, and it does not as yet appear that such is the case, the court may properly receive the evidence *de bene* and leave the whole matter to the jury, "with direction not to consider the evidence if they found that the parties were trying to compromise when the admissions and offer were made." *Webber v. Dunn*, 71 Me. 331, 340 (1880); *Hall v. Brown*, 58 N. H. 93 (1877).

When negotiations for a settlement have failed and the conference is breaking up, what is said by the parties is no longer privileged. *Broschart v. Tuttle*, 59 Conn. 1 (1890). Conversely, where the offer of compromise has been accepted its terms may be shown on a bill in equity to enforce it. *Omnium Securities Co. v. Richardson*, 7 Ontario, 182 (1884). Communications made to a third party, not during the pendency of compromise negotiations, are competent. *Moore v. Gaus*, 113 Mo. 98 (1892).

REASONS FOR THE EXCLUSION. — Two reasons are assigned for the exclusion of compromise offers. First: — that it is against public policy that attempts to terminate litigation should be burdened by the danger of having any statements made in the course of them used against the declarant.

So where the attempt was made to prove the plaintiff's admission of what he had offered to settle for, the court, in rejecting the evidence, say: — "It was but one of the modes of proving a fact which, upon the soundest principles of public policy, cannot be proved at all." *Harrington v. Inhabitants of Lincoln*, 4 Gray, 563 (1855). "Parties negotiating for a settlement would be shy of offering their best terms if their offers were not privileged." *Daniels v. Woonsocket*, 11 R. I. 4 (1874). "The authorities seem, though not very numerous, to be clear upon the first point, that letters written or communications made without prejudice, or offers made for the sake of buying peace, or to effect a compromise, are inadmissible in evidence. It seemingly being considered against public policy as having a tendency to promote litigation, and to prevent amicable settlements." *Pirie v. Wyld*, 11 Ont. Rep. 422 (1886). In *Perkins v. Concord R. R.*, 44 N. H. 223 (1862) the exclusion is said to be "on grounds of public policy." "This rule is founded in policy, that there may be no discouragement to amicable adjustment of disputes, by a fear, that if not completed, the party amicably disposed may be injured." *Gerrish v. Sweetzer*, 4 Pick. 373, 377 (1826). "This rule is well settled that no advantage can be taken of offers made by way of compromise; that a party may, with impunity, attempt to buy his peace." *Tennant v. Dudley*, 144 N. Y. 504 (1895).

Second; — because a statement made, not because it is believed to be true but as an inducement to the purchase or sale of peace is

not sufficiently probative of the truth of the statement as to warrant its being received in evidence. "Peace is of such worth that a reasonable man may well be presumed to seek after it even at the cost of his strict right, and by an abatement from his just claim. The offer which a man makes to purchase it is to be taken, not as his judgment of what he should receive at the end of litigation, but what he is willing to receive and avoid it." *Harrington v. Inhabitants of Lincoln*, 4 Gray, 563 (1855); *Smith v. Shell*, 82 Mo. 215 (1884). "To permit the introduction of such offers tends to discourage the adjustment of suits, and for that reason is against the policy of the law. If the object of the party in making the offer was to buy his peace (which is impliedly manifested by a mere proposition to pay a sum in settlement), it is deemed to have been made without prejudice and will be excluded." *International &c. R. R. v. Ragsdale*, 67 Tex. 24 (1886); *Draper v. Inhabitants of Hatfield*, 124 Mass. 53 (1878).

"It was a mere offer to pay a sum of money to get rid of a law suit, and was in no sense an admission that he owed the plaintiff that or any other sum." *Richards v. Noyes*, 44 Wis. 609 (1878).

"It is never the intendment of the law to shut out the truth; but to repel any inference, which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, because it is a fact, the evidence to prove it is competent, whatever motive may have prompted to the declaration." *Hartford Bridge Co. v. Granger*, 4 Conn. 142 (1822) cited with approval in *Fuller v. Hampton*, 5 Conn. 416, 426 (1824).

Where an offer is not an effort to settle a disputed claim but an admission of liability, it is competent. *McKinzie v. Stretch*, 53 Ill. App. 184 (1893).

Where a conversation is held, not "for the purpose of endeavoring to make a compromise of disputed claims, or that an offer or offers might be made to purchase peace, but for the purpose of ascertaining the claims really existing and justly due from one party to the other, that they might be fairly adjusted" such a conversation, it has been held, "could not have been excluded by any well established rule of evidence." *Cole v. Cole*, 33 Me. 542 (1852). Similarly, where the conversation relates not to the existence of a liability but concerns contemplated methods of paying an admitted claim, it is not privileged. *Hood v. Tyner*, 3 Ind. App. 51 (1891).

The question whether an offer is an admission of liability or a mere purchase of peace is a question of fact for the court, the decision of which may be set aside when against the evidence. *Colburn v. Groton*, 66 N. H. 151 (1889).

INDEPENDENT FACTS. It is entirely consistent with the reasoning on which offers of compromise are excluded as admissions that statements of independent facts, though made in the course of compromise negotiations, are regarded as competent. Such independent facts are presumably stated, not for the sake of peace, but because they are believed to be true. So, while an offer of settlement of an injury caused by a defect in a highway is incompetent, statements of the particulars of the injury are admissible. "The presiding judge ruled that no offer of settlement, made by the plaintiff in a conversation had with the agents of the defendants, with a view to the adjustment of the controversy, was competent; but that statements of independent facts, made in the course of such conversation, might be admitted. The distinction is sound. The facts stated were capable of being proved by any competent evidence, including the admission of the plaintiff. The amount of a doctor's bill, the cost of board during sickness, the loss of time by absence from the service of his employer, were simple facts, capable of exact certainty — facts, the statement of which would not be modified by the occasion on which it was made, certainly not to the prejudice of the party making it." *Harrington v. Inhabitants of Lincoln*, 4 Gray, 563 (1855). "An admission of an independent fact in no way connected with the offer of compromise, although made during the negotiations, is competent evidence." *Louisville, &c. R. R. v. Wright*, 115 Ind. 378 (1888); *Perkins v. Concord R. R.*, 44 N. H. 223 (1862); *Draper v. Inhabitants of Hatfield*, 124 Mass. 53 (1877); *Wrege v. Westcott*, 30 N. J. Law, 212 (1862). "This rule seems confined to the mere offer of compromise, for it is held that any independent facts admitted during the treaty for a compromise, may be given in evidence as confessions." *Gerrish v. Sweetser*, 4 Pick. 374, 377 (1826). "The authorities seem well agreed that proposals made while a compromise is in treaty between the parties cannot be offered in evidence, but conversations in which an independent fact is disclosed may be admitted to prove it." *Broschart v. Tuttle*, 59 Conn. 1, 23 (1890). So a statement by a plaintiff when approached with a view to settling a case that he knew nothing about it, that it was A.'s doings and A. "would have to foot it in the end" are competent facts. "It was not an offer for a compromise, but an unqualified admission of a fact. This is the true distinction between such statements of a party as are admissible, and such as should be rejected on the principle that men must be allowed 'to buy their peace' without prejudice." *Marvin v. Richmond*, 3 Denio, 58 (1846); *McElwee Mfg. Co. v. Trowbridge*, 68 Hun, 28 (1893). "The rule is strictly held in this State that an offer to compromise is not to be shown, on account of the tendency such a practice would have to discourage the settlement of disputes. But it is at the same time held with equal clearness, that any independent admission, though made in

the course of negotiations for a compromise, may be shown." *Plummer v. Currier*, 52 N. H. 287 (1872). In the last-named case it was accordingly held, in a case where a question was as to whether a tenant was to pay rent, that an offer by the defendant to submit the question how much rent was due to an award, was a competent fact. *Ibid.* "Admissions made on the occasion of an attempted settlement, if parcel of the treaty for a compromise, and made in furtherance of the treaty, are privileged, and cannot be given in evidence against the party making them, because they are made upon a confidence and trust, and are received as such by the party to whom they are addressed. But if a party during such treaty admits a fact to be true because it is a fact, and not because he is willing to treat it as a fact for the purposes of the then pending compromise, it may properly be shown in evidence." *Doon v. Ravey*, 49 Vt. 293 (1877); *Kahn v. Traders' Ins. Co. (Wyo.)*, 34 Pac. Rep. 1059 (1893). So, an admission that there is nothing the matter with the plaintiff's side of an account, though made in the course of an effort to settle a dispute, is competent. *Goodnow v. Parsons*, 36 Vt. 46 (1863). A distinct admission of a contract may be shown even if made in the course of compromise negotiations. *Scofield v. Parlin, &c. Co.*, 61 Fed. Rep. 804 (1894).

"It is the policy of the law to facilitate the settlement of controversies, and therefore an offer to pay a sum of money to compromise a dispute, is not admissible in evidence to prove that the sum offered was admitted to be due. But it is also the object of the law of evidence to ascertain the truth, and therefore the distinct admission of a fact in a letter or in conversation, is not to be excluded because it is accompanied by an offer to compromise the suit. Proposals made while the compromise is on the carpet, do not bind, but conversations in which a fact is disclosed may be admitted to prove it." *Arthur v. James*, 28 Pa. St. 236 (1857). So the payment of a sum of money to the mother of a bastard for its support is a competent fact though efforts at a compromise were still pending. *Fuller v. Hampton*, 5 Conn. 416, 420 (1824). "Although the policy of the law favors amicable settlements of controversies and therefore prohibits evidence of negotiations made by a party for the purpose of buying his peace, when during negotiations for a compromise a fact is conceded as in this instance without reservation, evidence of such admission is competent against the party." *Kutcher v. Love*, 19 Col. 542 (1894). "Offers of compromise do not bind; but admissions or statements of the facts are evidence, though made in an endeavor to effect a settlement." *Thom v. Hess*, 51 Ill. App. 274 (1893). "The letter was a mere offer to accept \$15.00 in satisfaction of the plaintiffs' demand, and as such was properly excluded as an offer of compromise. . . . The question is a very different one from that which would have been presented had the letter stated that the

wood in question was worth only \$10.00. *Fowles v. Allen*, 64 Conn. 350 (1894).

So an admission that one is a partner, though made in the course of compromise negotiations, is competent. *Garner v. Myrick*, 30 Miss. 448 (1855).

So "where the execution of the contract sued on is denied by the defendant, a letter offering to compromise the claim, and making an express recognition of the contract, is admissible in evidence as an admission of the execution of the contract." *Scofield v. Parlin*, 61 Fed. Rep. 804 (1894).

An offer by the defendant to a bastardy complaint to pay half the expenses of putting the prosecutrix away from home is competent. *Robb v. Hewitt*, 39 Neb. 217 (1894).

Admissions and statements of facts are competent, though made in an effort to effect a settlement. *Thom v. Hess*, 51 Ill. App. 274 (1893); *Kutcher v. Love*, 19 Col. 542 (1894); *Taylor v. R. R. Co.*, 101 Mich. 140 (1894).

But it has been held that the fact that a particular claim is not made during the pendency of compromise negotiations is not competent. *Kierstead v. Brown*, 23 Neb. 595 (1888).

Where the offer of compromise actually contains or amounts to an admission of liability, that fact is competent. *McKinzie v. Stretch*, 53 Ill. App. 184 (1893).

The supreme court of Indiana have apparently added a further qualification upon the rule admitting in evidence an admission of an independent fact made in the course of compromise negotiation, viz., that the admission of such independent fact should not have been designed to further the reaching of a compromise. This certainly seems within the "equity of the rule." "Even if it be conceded that the conversation between the parties related to a compromise, still a specific admission of a fact, because it is a fact, made in the course of such a conversation, and not made to open the way to a compromise, is admissible. The rule on this subject is thus stated by the court in one of the cases referred to by the appellant: 'An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point.' *Wilt v. Bird*, 7 Blackf. 258. Substantially the same language is used in *Cates v. Kellogg*, 9 Ind. 506; and in *Pattison v. Norris*, 29 Ind. 165, a somewhat broader statement is made. The rule stated governs here, for the defendant admitted, as an independent substantive fact, that he had uttered slanderous words, imputing to the plaintiff a want of chastity, and did not make the admission for the purpose of securing a compromise." *Binford v. Young*, 115 Ind. 174 (1888).

WHEN CONCLUSIVE. — Admissions, as a rule, are capable of explanation, and their effect may be controlled by other evidence. *Buzard v. McAnulty*, 77 Tex. 438 (1890); *Kinney v. Farnsworth*, 17 Conn. 355 (1845). "Receipts and other admissions of parties are always open to explanation, unless under particular circumstances, as where they have led to conduct in other parties, involving loss to them, by reason of their having acted upon the faith of such admissions: or unless they can be treated all the way through as conclusive." *Cuvillier v. Browne*, 4 Q. B. U. C. 105 (10 Vic.). "It is insisted that the plaintiff had, after the accident, made certain statements or admissions that he was walking backward at the time that his foot got caught, which were inconsistent with his testimony. Such statements go to the credibility of his testimony merely, and are for the jury." *Eastman v. Railway Co.*, 101 Mich. 597, 603 (1894).

So a pleader may show that his admission in pleading was made inconsiderately and without adequate knowledge of the facts. *Smith v. Fowler*, 12 Lea, 163 (1883); *Buzard v. McAnulty*, 77 Tex. 438 (1890).

So an admission in court may be retracted at a subsequent trial, though the fact of the previous admission is still competent. *Perry v. Simpson Waterproof Mfg. Co.*, 40 Conn. 313 (1873). See also *Stowe v. Bishop*, 58 Vt. 498 (1886), to the effect that where a man admitted negligence he can show that upon reflection he became convinced that his conduct was justified. "In the circumstances of the case, negligence was a question of fact and not of law, and defendant's statements were evidence against him on that point; but as they were non-contractual and non-dispositive admissions, they were not conclusive proof of that which he stated, but were open to neutralization by showing that on reflection and consideration he had come to think otherwise. *Dennison v. Miner*, 2 Atl. Rep. 561 (Sup. Ct. of Pa.), is exactly in point."

CONCLUSIVE ADMISSIONS ARE ESTOPPELS. — Under what circumstances an admission is conclusive is a question decided by the ordinary rules of equitable estoppel. Admissions, by silence or otherwise, which have been acted on by the person to whom made, cannot be denied if their denial would work injury to one who has acted upon them in good faith. *Corser v. Paul*, 41 N. H. 24 (1860); *Cuvillier v. Browne*, 4 Q. B. U. C. 105 (1847); *Welland Canal Co. v. Hathaway*, 8 Wend. 480 (1832).

CHAPTER X.

CONFESSIONS.

§ 862.¹ THE only topic under the general head of admissions which remains to be discussed, is that of CONFESSIONS of guilt in criminal cases. In such cases evidence of oral confession of guilt ought—as just remarked in regard to admissions in civil proceedings,²—to be *received with great caution*.³ Not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory,⁴ but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof,⁵—together with the character of the witnesses, who are sometimes necessarily called in cases of secret and atrocious crime,—all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where,

¹ Gr. Ev. § 214, in great part.

² Ante, § 861.

³ Macaulay has remarked, “Words may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A particle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence.” *History of England*, vol. 1, ch. 5, p. 583.

⁴ See *Earle v. Picken*, 1833 (Parke, B.); *R. v. Simons*, 1834 (Alderson, B.); *Coleman's case*, 1748 (Ir.). In *Resp. v. Fields*, 1822-4 (Am.), the court observed, “How easy is it for the

hearer to take one word for another, or to take a word in a sense not intended by the speaker; and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning! For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do.”

⁵ For a curious instance of this kind of exaggeration, see the evidence adduced in support of Hugh Macaulay Boyd's claim to the authorship of *Junius*. 1 *Woodfall's Junius*, *133—*137. See ante, § 57.

in civil actions, it would have been received. The weighty observation of Mr. Justice Foster should also be kept in mind, that "this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted."¹

§ 863. In addition to these sources of distrust, which are often sufficient to raise a serious doubt whether the confession given in evidence was actually made by the prisoner in the words, or to the effect, stated by the witnesses, there is yet another reason why caution should be employed in receiving and weighing confessions. The statements, though made as deposed to, may be *false*. The prisoner, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession;² and the same result may have arisen from a morbid

¹ Fost. C. L. 243. See, also, 1 Ph. Ev. 307; Lench v. Lench, 1805; Smith v. Burnham, 1838 (Am.); R. v. Crossfield, 1796, per Mr. Adams, in his address to the jury. The civilians placed little reliance on naked confessions of guilt, not corroborated by other testimony. Carpzovius, after citing the opinion of Severus to that effect, and enumerating the various kinds of misery which tempt its wretched victims to this mode of suicide, adds—"quorum omnium ex his fontibus contra se emissa pronuntiatio, non tam delicti confessione firmati quam vox doloris, vel insanientis oratio est": Carpz. Pract. Rer. Cr. Pars. III. Qæst. 114, p. 160. So, also, in the Eccles. Courts it is regarded with great distrust. See per Sir W. Scott, in Williams v. Williams, 1798.

² In Greenleaf on Evidence, 15th edit., 1892, p. 290, various cases and dicta are cited of confessions which were false, and thus show the need of extreme caution as to accepting all confessions. Among other instances quoted is the remarkable case of the two Boorns (Am.), convicted in the Supr. Court of Vermont in September, 1819, of the murder of Russell Colvin, May 10th, 1812. It appeared that Colvin, who was the brother-in-law of the prisoners, was a person of weak mind; that he was

considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a violent blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he was murdered, which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but, in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to his death and the concealment of his remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket-knife of Colvin and a button of his clothes were found in an old open cellar in the same field, and in a hollow stump not many rods from it were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, the prisoners were convicted and sentenced to die. On the same day they applied to the

ambition to obtain an infamous notoriety,¹ from an insane or criminal desire to be rid of life, from a reasonable wish to break off old connexions, and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade,² or even from the delusion of an overwrought and fantastic imagination.³

§ 864. Still, the actual instances of *false* confessions of crime are very rare, and⁴ their just value has been happily stated by one of the most accomplished of modern jurists. "Whilst such anomalous cases," says the writer, "ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of court and jury."⁵

Legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends that, as they would certainly be convicted upon the circumstances proved, their only chance of life, by commutation of punishment, depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. This case, of which there is a Report in the Law Library of Harvard University, is critically examined in a learned article in the *North Amer. Rev.* vol. x. pp. 418—429. For another case of false confession, under a promise of pardon, see a case cited in note to Warickshall's case, 1783.

¹ One or other of these motives probably induced Hubert falsely to confess that he set fire to London in 1666. His confession cost him his life. See 6 How. St. Tr. 807—809, 819—821; and Wills, *Cir. Ev.* 70—75. See, also, General Lee's assertion that he was the author of Junius, as narrated in 1 Woodfall's *Junius*, *122, *123.

² Mr. Joy mentions the case of an innocent person making a false constructive confession, in order to fix suspicion on himself alone, that his guilty brothers might have time to escape,—a stratagem which was completely successful; after which he proved an alibi in the most satisfactory manner. Joy on Conf. (Ir.) 107; 1 Chit. Cr. L. 85, S. C.

³ This is probably the true key to the frequent confessions of the poor wretches in old times tried for witchcraft. See Mary Smith's case, 1616; Essex witches, 1645; Suffolk witches, 1665; Devon witches tried in 1682.

⁴ Gr. Ev. § 214, n. 2.

⁵ 1 Hoffman on Leg. Study, p. 367.

§ 865.¹ Indeed, all reflecting men are now generally agreed, that *deliberate and voluntary confessions of guilt, if clearly proved*, are among the most effectual proofs in the law; their value depending on the sound presumption, that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience.² Such confessions, therefore, made by a prisoner to any person, at any time, and in any place, are at common law receivable in evidence,³ while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.

§ 866.⁴ Confessions may be divided into two classes, namely, *judicial* and *extra-judicial*. *Judicial confessions* are those which are made before the magistrate, or in court, in the due course of legal proceedings; and it is essential that they be made of the free will of the party, and with full knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations taken in writing by magistrates pursuant to statute; and the plea of guilty to an indictment, made in open court. Either of these is sufficient by itself to support a conviction, though followed by a sentence of death, they both being deliberately and solemnly made under the protecting caution and oversight of the judge. Even on trials for treason or misprision of treason, where the law in its clemency affords to the accused unusual protection, a “willing confession without violence in open court,” renders it unnecessary to call witnesses in support of the charge;⁵ and, perhaps, also,—though this would seem to be highly questionable,⁶—a confession made during the solemnity of an examination before a magistrate or other person having authority to take it, will, if satisfactorily proved by two witnesses, be deemed sufficient evidence

¹ Gr. Ev. § 215, in part.

² Warickshall's case, 1783; Lambe's case, 1791; Mortimer v. Mortimer, 1820; Harris v. Harris, 1829; 1 Gilb. Ev. 216; Dig. lib. 42, tit. 2, de Confess.; Van Leeuw. Comm. b. v. ch. xxi. § 1; 2 Poth. Obl. App. Numb. xvi. § 13.

³ Lambe's case, 1791; M'Nally,

Ev. (Ir.) 42, 47.

⁴ Gr. Ev. § 216, as to first twelve lines.

⁵ 7 W. 3, c. 3 (“The Treason Act, 1695”), § 2; extended to Ireland by 1 & 2 G. 4, c. 24; Gregg's case, 1708.

⁶ Berwick's case, 1746; R. v. Willis, 1710 (Ward, C.B., and Eyre, S.-G.).

to warrant a conviction.¹ The canon law, too,—scrupulous as it is on the subject of evidence,—regards a *judicial* and free confession, made out of prison, and without any just fear or danger, as amounting, in the phrase of the Spiritual Courts, to a *plena probatio*.² The doctrine of the Roman law, was also to the like effect,—*confessos in jure pro judicatis haberi placet*;—and, indeed, it may be deemed a rule of universal jurisprudence.³

§ 867.⁴ *Extra-judicial confessions* are those which are made by the party elsewhere than before a magistrate, or in court; this term embracing not only *express* confessions of crime, but all those admissions and acts of the accused from which guilt may be *implied*. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts; and this, too, on trials for treason or misprision of treason, in like manner as on ordinary indictments; except only that, on these more serious occasions, they will not supply the want of the two witnesses, whose testimony is required by the Act of William the Third. Consequently, confessions, whether proved by one witness or two, can only be treated as *corroborative* evidence of the *overt* act charged;⁵ unless such overt act be the assassination of the Queen, or any attempt to injure her person, in which event the accused may be convicted on the same evidence as an ordinary murderer.⁶

§ 868.⁷ Whether, on ordinary indictments for felony or misdemeanor, *extra-judicial confessions, uncorroborated* by any other proof of the *corpus delicti*,⁸ are of themselves, in general, sufficient to justify a conviction of a prisoner, has been gravely doubted.⁹

¹ Fost. C. L. 240—243.

² Ayliffe Par. 545.

³ Cod. Lib. 7, tit. 59; 1 Poth. Obl. pt. iv. ch. 3, § 1, num. 798; Van Leeuw. Comm. b. 5, ch. 21, § 2; 1 Masc. de Prob. Conc. 344.

⁴ Gr. Ev. § 216, as to first five lines.

⁵ R. v. Willis, 1710; Fost. C. L. 240—243; R. v. Crossfield, 1796.

⁶ 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1.

⁷ Gr. Ev. § 217, in part.

⁸ As to when the *corpus delicti* need not be proved, see ante, § 141.

See, also, R. v. Unkles, 1873 (Ir.).

⁹ In Roman law, such naked confessions amounted only to a *semi-plena probatio*, upon which alone no judgment could be founded; and, at most, the accused, in particular cases, could only be put to the torture. But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence, and persisted in, they were received as plenary proof: Everh. Concl. xix. 8, lxxii. 5, cxxxi. 1, clxiv. 1, 2, 3, clxxxvi. 2, 3, 11; 1 Masc. de Prob. Concl. 347, 349; Van Leeuw. Comm. b. 5, ch. 21, §§ 4, 5; Carpz. Pract. Rer. Cr. Pars. II. Quæst. 60, n. 8.

In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found.¹ One case,² indeed, seems to be an exception; but it is far too briefly reported to be relied on as an authority.³ In the United States, a prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient to warrant his conviction,⁴ and this opinion certainly best accords with the humanity of the criminal law, with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and is countenanced by approved writers on this branch of the law.⁵

§ 869. However, in the Divorce Division a decree for dissolution of marriage *can*, as we have seen,⁶ legally rest on the respondent's admission of adultery, though unsupported by any confirmatory evidence.

§ 870.⁷ In the proof of confessions,—as in the case of admissions in civil causes,⁸—*the whole of what the prisoner said on the subject,*

¹ Thus, for example, in *R. v. Eldridge*, 1821, the prisoner, who confessed, was indicted for horse-stealing; the horse was found in his possession, and he had sold it for 12*l.*, after asking 35*l.*, which was its fair value. In another case (*R. v. Falkner and Bond*, 1822), the person robbed was called upon his recognizance, and it was proved that one of the prisoners, who confessed, had endeavoured to send a message to him to keep him from appearing. In yet another case (*R. v. White*, 1823) there was strong circumstantial evidence both of the larceny from the prosecutor's stable, and of the prisoner's guilt; and in the case of another prisoner (*R. v. Tippet*, 1823), who was indicted for the same larceny, part of this evidence was also given, together with the additional proof that such prisoner was an under-ostler in the same stable. In all these cases, too, except in that secondly cited (*R. v. Falkner and Bond*, 1822), the confessions were solemnly made before the examining magistrate, and taken down in due form of law; and in the case which forms the exception (*R. v. Falkner and Bond*, 1822) the confessions were re-

peated, once to the officer who apprehended the prisoners, and again on hearing the depositions read over which contained the charge. In another case, which is contained in a very brief note (Stone's case, 1561), it does not appear that the *corpus delicti* was not otherwise proved; on the contrary, the natural inference from the report is, that it was. See, also, *R. v. Sutcliffe*, 1850.

² *R. v. Wheeling*, 1789.

³ The report merely states that, "in the case of John Wheeling, tried before Lord Kenyon, at the Summer Assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence."

⁴ Greenleaf on Evidence, 14th (or 1892) edit., citing various American authorities.

⁵ See *Guild's case*, 1828 (Am.); *Long's case*, 1797 (Am.); and *R. v. Edgar*, 1831, cited 2 Russ. C. & M. 255, 826 n. b; and see also, 4 Hawk. P. C. 425.

⁶ Ante, § 768.

⁷ Gr. Ev. § 218, in great part.

⁸ Ante, §§ 725—734.

at the time of making the confession, should be taken together. It is not reasonable to assume, that the entire proposition respecting the prisoner's connection with the crime, with all its limitations, was contained in one sentence, or in any particular number of sentences. As the meaning of a writing must, in civil cases, be collected from the whole taken together, and as, when several instruments relating to the same matter have been executed at one time, they are all resorted to for the purpose of ascertaining the intention of the parties, so here, if one part of a conversation is relied on, as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; or at least so much as is explanatory of the part already proved, and perhaps, in *favorem vitæ*, all that was relative to the subject-matter in issue.¹ For, as already observed respecting admissions,² unless the whole is considered, the true meaning of the part which is evidence against the prisoner cannot be ascertained.

§ 871. But if, after the entire statement of a prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another.³ Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing.⁴ If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor is improbable in itself, it will be naturally believed by the jury; but they are not bound to give weight to it on that account, being at liberty to judge of it, like other evidence, by all the circumstances of the case.⁵ And if the confession implicate other persons by name, still it must be proved as it was

¹ Per *Ld. C. J. Abbott* in the *Queen's case*, 1820, *H. L.*; as qualified by the court in *Prince v. Samo*, 1838; *R. v. Jones*, 1827; *R. v. Higgins*, 1829.

Ante, §§ 725—729, and cases there cited.

³ *R. v. Jones*, 1827.

⁴ *R. v. Higgins*, 1829 (*Parke, J.*); *R. v. Steptoe*, 1830 (*Park, J.*); *Resp. v. McCarty*, 1781 (*Am.*).

⁵ Per *Littledale, J.*, in *R. v. Clewes*, 1830.

made, not omitting the names; but the judge will instruct the jury, that it is not evidence against anyone but the prisoner who made it.¹

§ 872.² Before any confession can be received in evidence in a criminal case, it must be shown to have been *voluntarily* made; for, “a confession, forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.”³ The evidence as to whether the confession has been obtained by the influence of hope or fear, being in its nature preliminary, is,—as we have seen,⁴—addressed to the judge, who will require the prosecutor to show *affirmatively*, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession.⁵ As the admission or rejection of a confession rests wholly in the discretion of the judge, it is difficult to lay down particular rules, *a priori*, for the government of that discretion; and the more so, because much must necessarily depend on the age, experience, intelligence, and character of the prisoner, and on the circumstances under which the confession was made.⁶ Language sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may perhaps reconcile some seemingly contradictory decisions. Still, it cannot be denied, that the principle of excluding all confessions induced by hope or fear on the part of the accused has been sometimes extended much too far, and applied to cases where no reason could be

¹ *R. v. Hearne*, 1830 (Littledale, J.); *R. v. Clewes*, 1830 (id.); *R. v. Fletcher*, 1829 (id.); *R. v. Hall*, 1833 (Alderson, B.); *R. v. Foster*, 1833 (Ld. Denman); *R. v. Walkley*, 1833 (Gurney, B., who said it had been much considered by the judges); *Parke, J.*, thought otherwise in *Barstow's case*, 1831. A striking example of the last proposition stated in the text was contained in the case of *Robinson v. Robinson and Lane*, 1858-9, in which a private diary kept by the wife, describing her intrigues with the correspondent, was received as a con-

fession against herself, though it was held to be inadmissible as evidence against her paramour.

² *Gr. Ev.* § 219, in part.

³ Per Eyre, C.B., in *Warickshall's case*, 1783; *McNally, Ev.* 47; *Knapp's case*, 1830 (Am.); *Chabcock's case*, 1804 (Am.).

⁴ *Ante*, § 23.

⁵ *R. v. Warringham*, 1851 (Parke, B.); *R. v. Thompson*, 1893.

⁶ *McNally, Ev.* 43 (Ir.); *Nate's case*, 1800 (Ld. Eldon, when C.J.); *Knapp's case*, 1830 (Am.).

given for supposing that the inducement had had any influence upon the mind of the prisoner.¹

§ 873. Although no definite rule can be framed which shall be an unerring guide in every supposable case, there are some points, both in regard to the *person by whom the promise or threat is made*, and also in regard to the *nature of the inducement* itself, on which the judges have pretty generally agreed, a knowledge of which will materially assist the inquiry, whether any particular confession should be admitted in evidence or rejected. And² first, as to the *person by whom the inducement is offered*. Here, it is very clear, that if the promise or threat be made by anyone *having authority* over the prisoner in connection with the prosecution,³—as, for instance, by the prosecutor,⁴ the master or mistress of the prisoner, when the offence concerns such master or mistress,⁵ the chairman of the company which is prosecuting him,⁶ the constable,⁷ or other officer,⁸ having him in custody, a magistrate,⁹ or the like,¹⁰—the confession will be rejected as not being voluntary. The same rule will perhaps prevail, though the inducement was not actually offered by the person in authority, if it were held out by *anyone in his presence*, and he by his silence sanctioned it.¹¹

§ 874. In these cases, as the authority possessed by the persons who make or sanction the inducement is calculated both to animate

¹ See the observations of the judges in *R. v. Baldry*, 1852.

² Gr. Ev. § 222, in part.

³ *R. v. Parratt*, 1831 (Alderson, B.), which was a confession by a sailor to his captain, who threatened him with prison on a charge of stealing his watch; *R. v. Thompson*, 1783; *R. v. Fleming*, 1842 (Ir.).

⁴ *R. v. Cass*, 1784 (Gould, J.); *R. v. Jones*, 1809; *R. v. Jenkins*, 1822.

⁵ *R. v. Moore*, 1852; *R. v. Warrington*, 1851; *R. v. Upchurch*, 1836; *R. v. Taylor*, 1839 (Patteson, J.); *R. v. Hearn*, 1841 (Coltman, J.); *R. v. Hewett*, 1842 (Patteson, J.).

⁶ *R. v. Thompson*, 1893.

⁷ *R. v. Morton*, 1843 (Coleridge, J.); *R. v. Swatkins*, 1831 (Patteson, J.); *R. v. Mills*, 1833 (Gurney, B.); *R. v. Shepherd*, 1836 (Gaselee, J.).

⁸ In *R. v. Enoch*, 1833, Park and Taunton, JJ., rejected a confession,

where the prisoner was left in charge of a woman, to whom she confessed; and in *R. v. Windsor*, 1864, Channell, B., and Crompton, J., laid down the law in a similar manner. See *qu.*, and see *R. v. Sleeman*, 1853; and *R. v. Vernon*, 1872.

⁹ *R. v. Drew*, 1837 (Coleridge, J.); *R. v. Cooper*, 1833 (Parke, J.); *Guild's case*, 1828 (Am.).

¹⁰ *Qu.* a surgeon; see *R. v. Kingston*, 1830; *R. v. Garner*, 1848. In this last case the inducement was held out by a surgeon, but in the presence of the prisoner's master. *Qu.* also, the husband of the prisoner: *R. v. Laugher*, 1846.

¹¹ *R. v. Pountney*, 1836 (Alderson, B.); *R. v. Taylor*, 1839 (Patteson, J.); *R. v. Drew*, 1837 (Coleridge, J.); *R. v. Simpson*, 1834 (Ir.); *R. v. Laugher*, 1846 (Pollock, C.B.); *R. v. Luckhurst*, 1853. But see *R. v. Parker*, 1861.

the prisoner's hopes of favour, on the one hand, and, on the other, to inspire him with awe, and in some degree to overcome the powers of his mind, the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which the prisoner under these circumstances may be induced to make. Moreover,—and this is a more sensible reason for the rule,—the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners, in the hope of wringing from them a reluctant confession. It has been argued, with apparent reason, that a confession made upon the promises or threats of a person, assuming to act in the capacity of an officer or magistrate, and erroneously believed by the prisoner to possess such authority, ought, upon the above principles, to be excluded; but the point is not known to have received any judicial consideration.

§ 875.¹ Whether a confession *made to a person*, who *having no authority has held out an inducement*, will be receivable, is a question upon which judges entertain opposite opinions.² Bosanquet, J., on two occasions, held that the fact of *any* person telling a prisoner that it would be better for him to confess, would *always* exclude any confession made to *that person*; ³ and one or two other cases may perhaps be cited in support of the same view.⁴ On the other hand, Patteson, J., is reported to have said, in a more recent case, that, *in the opinion of the judges*, any confession is receivable, unless some inducement has been held out by a person in *authority*; and with

¹ Gr. Ev. § 223, in part.

² R. v. Spencer, 1837 (Parke, B.). See, also, R. v. Pountney, 1836 (Alderson, B.); R. v. Gibbons, 1823.

³ R. v. Dunn, 1831; R. v. Slaughter, 1831. In R. v. Downing, 1840, where a woman was indicted for child-murder, a confession made by her to an elderly woman, who was her neighbour and nurse, and who told her it was better for her to confess, was held by Ld. Abinger to be inadmissible; and his lordship refused to admit evidence of a confession subsequently made to a surgeon. Sed qu.

⁴ For instance, R. v. Kingston,

1830, where Parke and Littledale, JJ., rejected a confession made to a surgeon who had held out an inducement. Perhaps, however, this case may rest on the ground that the surgeon was a person in authority. In R. v. Walkley, 1833, where evidence of a confession was held inadmissible by Gurney, B., it does not appear whether or not the witness, to whom the statement was made, and who had offered the inducement, was a person in authority; and the same observation applies to the case of R. v. Thomas, 1834 (Patteson, J.). See, also, Guild's case, 1828 (Am.); and Knapp's case, 1830 (Am.).

reference to the particular facts of the case before him, and to have added that he would have received in evidence the statement made by the prisoner to an indifferent person, had the inducement been offered by such person alone.¹

§ 876. Both these contradictory decisions would seem to be open to one and the same objection; namely, they endeavour to define, as a *strict rule of law*, what circumstances shall be deemed, in all cases, to have unduly influenced the mind of the prisoner in making the confession. Now, although the general rule which has been laid down with reference to inducements offered by persons in authority, is that as such inducements will probably succeed in a large majority of instances, the presumption that they will have this effect must, for the sake of uniformity and precision, be adopted as applicable to them all; yet it by no means follows, that the same rule will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind; and, in such cases, the confession, which follows, but which, in fact, is not *consequent on* them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any promise made to him by a person in authority; in these cases the confession made to such private person should be excluded. It is therefore submitted, that, without laying down any positive rule, whether of admission or rejection, the judge should determine each case on its own merits; only bearing in mind, that his duty is to reject such confessions only as would seem to have been wrung from the prisoner under the supposition that it would be best for him to admit that he was guilty of an offence which he really never committed.²

§ 877.³ A promise or threat made by an *indifferent person*, who has officiously interfered without any kind of authority, will, however, it is clear, *never* operate to exclude a confession made to any

¹ R. v. Taylor, 1839; R. v. Sleeman, 1853.

² R. v. Court, 1836 (Littledale, J.).

³ Gr. Ev. § 223, in part.

other person, who has not himself sanctioned the inducement.¹ This rule is founded, partly, on the supposition that such inducements will seldom much influence the conduct of the prisoner; but chiefly, on the ground that, were a contrary rule to prevail, it would probably open a wide door to collusive practices, and would certainly go far towards rendering all confessions inadmissible.

§ 878. Where promises or threats have been once used of such a nature as to render a confession inadmissible, all *subsequent* admissions of the same or the like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there be good reason to presume, that the delusive hope or fear which *influenced* the first confession has been *effectually dispelled*.^{1a} Where,² however, it appears, to the satisfaction of the judge, that the improper *influence was totally done away before* the confession was made, the evidence will be received.³ For example, where a magistrate told a prisoner that if he was not the actual culprit and would disclose all he knew, he would use his influence to protect him; but on subsequently receiving a letter from the Secretary of State refusing mercy, communicated its contents to the prisoner, it was held that a confession, which the prisoner afterwards made to the coroner, who had also duly cautioned him, was clearly voluntary, and was admissible;⁴ and where an accused had been induced by promises of favour to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two magistrates that he must expect death and prepare to meet it, again fully acknowledged his guilt, the latter confession was received in evidence.⁵ Indeed, it may be generally laid down, that, though an inducement has been held

¹ *R. v. Gibbons*, 1823 (Park, J., and Hullock, B.); *R. v. Hardwick*, 1811 (Wood, B.); *R. v. Row*, 1809; *R. v. Tyler*, 1823 (Hullock, B.).

^{1a} *Joy on Conf.* (Ir.) 69; *Guild's case*, 1828 (Am.); *R. v. Hewett*, 1842 (Patteson, J.), recognizing *Meynell's case*, 1834 (Taunton, J.); *Sherrington's case*, 1838 (Patteson, J.); *R. v. Cooper*, 1833 (Parke, J.); *Bell's case*, 1800 (Ir.), cited in *Joy on Conf.*

(Ir.) 71, and in *M'Nally, Ev.* (Ir.) 43 (Ld. Kilwarden, C.J., and Carleton, C.J. of C. P.); *R. v. Rosa Rue*, 1876; *Roberts' case*, 1827 (Am.); *R. v. Walsh*, 1843 (Ir.) (Jackson, J.).

² *Gr. Ev.* § 221, in part. See *R. v. Doherty*, 1874.

³ See *R. v. Cheverton*, 1862.

⁴ *R. v. Clewes*, 1830 (Littledale, J.). See, also, *R. v. Dingley*, 1845.

⁵ *Guild's case*, 1828 (Am.).

out by an officer, a prosecutor, or the like, and though a confession has been made in consequence of such inducement, still, if the prisoner be subsequently warned by a person in equal or superior authority, that what he may say will be evidence against himself, or that a confession will be of no benefit to him,—or if he be simply cautioned by the magistrate not to say anything against himself,—any admission of guilt afterwards made, will be received as a voluntary confession.¹ More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority, as a magistrate, and the confession is afterwards made to an inferior officer; because a caution from this latter person might be insufficient to efface the expectation of mercy which had previously been raised in the prisoner's mind.²

§ 879. Passing now to the *nature of the inducement*, it may be laid down as a general rule, that in order to exclude a confession, the inducement, whether it assume the shape of a promise, a threat, or mere advice, must be such as is calculated to influence the prisoner's mind with respect to his escape from the charge. A confession, therefore, will be received, though it were induced by *spiritual exhortations*, whether of a clergyman,³ or of any other person;⁴ for such a confession can scarcely be regarded as *untrue*; and the law of England and Ireland,—unlike that which prevails in Scotland,⁵ America, and in countries subject to the Roman law,⁶—does not, as will presently be pointed out,⁷ regard penitential confessions to a priest in the light of privileged communica-

¹ *R. v. Howes*, 1834 (Ld. Denman); *R. v. Lingate*, 1815; *R. v. Rosier*, 1821; *R. v. Bryan*, 1834 (Ir.); *Joy on Conf. (Ir.)* 72—74. See *R. v. Richards*, 1832.

² *R. v. Cooper*, 1833 (Parke, J.).

³ *R. v. Gilham*, 1828, explained in *Joy on Conf. (Ir.)* 52—56; *Com. v. Drake*, 1818 (Am.). But see *R. v. Griffin*, 1853.

⁴ *R. v. Wild*, 1835; *R. v. Nute*, 1842; recognized in *R. v. Hewitt*, 1842 (Patteson, J.); *R. v. Gibney*, 1822 (Ir.); *R. v. Sleeman*, 1853.

⁵ 2 Alison, Cr. L. of Sc. (Sc.), cited in *Joy on Conf. (Ir.)*, 57, n. a, 58.

⁶ In the Roman law penitential confessions to the priests are en-

couraged for the relief of the conscience, and the priest is bound to secrecy by the peril of punishment. “*Confessio coram sacerdote in penitentiâ facta non probat in iudicio; quia censetur facta coram Deo; imo, si sacerdos eam enunciet, incidit in pœnam.*” 1 Masc. de Prob., Concl. 377. It was lawful, however, for the priest to testify in such cases to the fact, that the party had made such a penitential confession to him as the Church requires, and that he had enjoined penance upon him; and, with the express consent of the penitent, he might lawfully testify to the substance of the confession itself. Id.

⁷ Post, §§ 916, 917.

tions. But it is not necessary that at the time when the inducement is held out the charge against the prisoner should have been actually made; for where a man was at that time threatened to be given into custody without any offence being then specified, but the nature of the charge was afterwards stated, and he confessed his guilt, the confession was held not admissible.¹

§ 880. A promise, too, of some merely *collateral benefit or boon*, as for instance, a promise to give the prisoner some spirits,² or to strike off his handcuffs,³ or to let him see his wife,⁴ or perhaps (where she is a female) to abstain from an examination of her person,⁵ will not be deemed such an inducement as will authorise the rejection of a confession made in consequence. And confessions will in general be admitted, though caused by intimidating language, provided the intimidation has had no reference to the charge, and was not otherwise calculated to produce any untrue statement.⁶ Moreover, an inducement held out to a prisoner with reference to one charge will generally not exclude a consequent confession which relates to another;⁷ unless the two offences be so blended together as to constitute in reality but one transaction.⁸

§ 881.⁹ If no *inducement* has been held out relating to the charge, it matters not indeed in what way the confession has been obtained; for whether it were induced by a solemn *promise of secrecy*, even confirmed by an oath;¹⁰ or by reason of the prisoner having been made *drunken*;¹¹ or even by *deception* practised upon him, or false representation made to him for that purpose;¹² it will be equally

¹ R. v. Luckhurst, 1853.

² R. v. Sexton, 1822, cited in Joy on Conf. (Ir.) 17—19, is to the contrary; but this case (decided by Best, J.) is probably not law. See observations of Mr. Greaves in 2 Russ. C. & M. 827, n. (k).

³ R. v. Green, 1834 (Bosanquet and Taunton, JJ.).

⁴ R. v. Lloyd, 1834 (Ir.) (Patteson, J.).

⁵ R. v. Cain, 1839. But under precisely these circumstances, two able English judges have declined to admit the evidence. R. v. Bowden, 1859 (Martin, B., after consulting Willes, J.); MS. ex relatione, Mr. Ch. Hy. Hopwood.

⁶ See R. v. Thornton, 1824.

⁷ R. v. Warner, 1832 (Littledale, J.).

⁸ R. v. Hearn, 1841 (Coltman, J.).

⁹ Gr. Ev. § 229, in part.

¹⁰ R. v. Shaw, 1834 (Patteson, J.); Com. v. Knapp, 1830 (Am.).

¹¹ R. v. Spilsbury, 1835 (Coleridge, J.), qu. on the ground that in *vino veritas*. In R. v. Sippet, tried at Maidstone Ass. 1839, a confession, made by prisoner while *talking in his sleep*, having been tendered in evidence, Tindal, C.J., doubted its admissibility, and it was withdrawn. MS.

¹² R. v. Derrington, 1826 (Garrow, B.); R. v. Burley, 1818 (id.), afterwards confirmed by all the judges.

admissible. Much less will a confession be rejected merely because it has been elicited by *questions* put to the prisoner whether by a magistrate,¹ officer² or private person;³ and the form of the question is immaterial, even though it assumes the prisoner's guilt.⁴ If a prisoner make a confession under the hope, held out by a person *not in authority*, that he will thereby be admitted as Queen's evidence, it will be received against him;⁵ and so it will also, though his hopes have been excited by a constable or other officer, if on the trial of his accomplices he refuses to make a full disclosure, and thus violates the condition on which his claim to favour can alone rest.⁶ What the accused has been *overheard* muttering to himself, or saying to his wife or to any other person in confidence, is also receivable in evidence;⁷ though the wife, solicitor and counsel of the prisoner will not, on grounds that will be presently explained, be themselves allowed to reveal what he has said to them.⁸ A voluntary confession, too, is admissible to whomsoever it may have been made, though it does not appear that the prisoner was *warned* that what he said would be used against him, nay, though it appears on the contrary that he was *not* so warned.⁹

§ 882. In most cases it is indeed advisable and proper to caution

¹ *R. v. Rees*, 1836 (Ld. Denman); *R. v. Bartlett*, 1837 (Bolland, B.); *R. v. Ellis*, 1826 (Littledale, J.), citing a similar decision of Holroyd, J., and overruling *R. v. Wilson*, 1817 (Richards, C.B.).

² *R. v. Thornton*, 1824; *R. v. Gibney*, 1822 (Ir.); *R. v. Kerr*, 1837; *R. v. Johnston*, 1864 (Ir.) (8 v. 3 JJ.). The case of *R. v. Devlin*, 1841 (Ir.), is *contrà*, but seems not to be law.

³ *R. v. Wild*, 1835.

⁴ *R. v. Wild*, 1835; *R. v. Thornton*, 1824; *R. v. Kerr*, 1837 (Park, J.); *Anon.*, undated (Littledale, J.), cited 1 Ph. Ev. 406. In the case of *R. v. Doyle*, 1840 (Ir.), a constable, after cautioning the prisoner, asked her how so much of her blue came into the child's stomach, and Bushe, C.J., is reported to have rejected the answer; but this case, it is submitted, is not law. See Joy on Conf. (Ir.), 32—41, 42—44.

⁵ *R. v. Berigan*, 1841 (Ir.) (Cramp-

ton, J.). This case seems to overrule *R. v. Hall*, 1790 (Mr. Sergt. Adair). See *R. v. Boswell*, 1842; *R. v. Blackburn*, 1853. See, also, post, § 885.

⁶ *R. v. Dingley*, 1845 (Pollock, C.B.); *R. v. Burley*, 1818, approved of by all the judges. See *R. v. Gillis*, 1866.

⁷ *R. v. Simons*, 1834 (Alderson, B.). In *R. v. Pamentor*, 1872, Kelly, C.B., is reported to have held that a letter written by a prisoner to his wife, and intercepted by a constable who had undertaken to post it, was inadmissible. But this case would seem not to be law.

⁸ Post, §§ 909—915; *R. v. Shaw*, 1834 (Patteson, J.).

⁹ *R. v. Thornton*, 1824; *R. v. Gibney*, 1822 (Ir.); *R. v. Magill*, 1799, cited in McNally, Ev. (Ir.) 38; *R. v. Long*, 1833 (Gurney, B.); Joy on Conf. (Ir.) 45—48; *R. v. Lavin*, 1843 (Ir.) (Perrin, J.).

a prisoner in general terms that any confession he makes will be admissible against him at the trial, and can do him no service;¹ the reason for this being that if it be not done in case of its turning out that any threat or inducement has been previously held out by some person in authority, any confession, made by a prisoner without having subsequently received such a caution, will, as before stated,² be inadmissible. Still, it is not necessary, in general, to do more than to show that a party receiving a confession left the prisoner at full liberty to act and judge for himself; and though it should appear that immediately before the admission was made the accused was in the custody of another person, the court, unless some reason exists for suspecting collusion, will not compel the prosecutor to call such person as a witness, or to prove that he did not hold out any threat or inducement.³ In order, however, to free the evidence from all reasonable objection, it will be prudent, especially in important cases, to call any persons in authority, who, shortly before the confession was made, either had the prisoner in custody, or held any conversation with him.⁴ Notwithstanding that the law is as stated above, many justices of the peace, both in England and Ireland, are in the habit of *dissuading* the culprit, with more or less earnestness, from disclosing any fact which may tend to establish his guilt. This practice (to be admired for romantic generosity rather than for wisdom or for any beneficial consequences resulting therefrom to the public,⁵) has been condemned by several able judges, as an absurd and improper mode of shutting up one of the most valuable sources of justice and truth.⁶

§ 883.⁷ It has been thought that *illegal imprisonment* is calculated to exert such influence upon the mind of the prisoner as to justify the inference that his confessions made during its continuance were

¹ *R. v. Green*, 1832 (Gurney, B.); *R. v. Arnold*, 1838 (Ld. Denman); *R. v. O'Reilly*, 1832 (Ir.) (Ball, J.).

² *Ante*, § 878.

³ *R. v. Clewes*, 1830 (Littledale, J.); *R. v. Swatkins*, 1831 (Patteson, J.); *R. v. Gibney*, 1822 (Ir.); *R. v. Courtney*, 1840 (Ir.) (Ball, J.); *Joy on Conf.* (Ir.) 59—61.

⁴ See cases cited in last note.

⁵ *Edinb. Rev.*, March, 1824.

⁶ *R. v. Green*, 1832 (Gurney, B.); *R. v. Arnold*, 1838 (Ld. Denman). In *R. v. Cart*, 1838, Ld. Denman observed to some constables, who were called as witnesses:—"The distinction is very clear; you are not to suppress the truth, but you are not to take any measures of your own to endeavour to extort it."

⁷ *Gr. Ev.* § 230, almost verbatim.

not voluntary; and, on one occasion, they appear on this ground to have been rejected.¹ But this doctrine cannot be considered as satisfactorily established.²

§ 884. The question remains, what language is sufficient to constitute such inducement or threat. Here the reported decisions furnish a very unsatisfactory guide. Some reason may be given for applying the rule that the confession obtained by them is inadmissible to such words as these:—"Unless³ you give me a more satisfactory account, I will take you before a magistrate;"⁴ "If you will tell me where my goods are, I will be favourable to you;"⁵ "I only want my money, and if you give me that, you may go to the devil;"⁶ "If you will not tell all you know about it, of course we can do nothing;"⁷ "You are under suspicion of this, and you had better tell all you know;"⁸ "The watch has been found, and if you do not tell me who your partner was, I will commit you to prison;"⁹ "You had better split, and not suffer for all of them;"¹⁰ or the remark to a third person who it is known will probably communicate to him, "It will be better for so-and-so (naming the prisoner) to speak the truth."¹¹ Confessions have, however, been rejected in consequence of such expressions as the following having been used:—"It will be better for you to speak the truth;"¹² "The inspector tells me you make housebreaking tools; if so, you had better tell the truth, it will be better for you."¹³ "It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it;"¹⁴ "Now, be cautious in the answers you give me to the questions I am going to put to you about this watch."¹⁵ So anxious, indeed, was the court at one time to

¹ *R. v. Ackroyd*, 1824 (*Holroyd*, J.).

² *R. v. Thornton*, 1824.

³ *Gr. Ev.* § 220, in part.

⁴ *R. v. Thompson*, 1783 (*Hotham*, B.); *R. v. Luckhurst*, 1853; *R. v. Richards*, 1832 (*Bosanquet*, J.), cited as *R. v. Griffiths*, 1832; *R. v. Walsh*, 1843 (*Ir.*) (*Jackson*, J.).

⁵ *R. v. Cass*, 1784 (*Gould*, J.); *Boyd v. The State*, undated (*Am.*).

⁶ *R. v. Jones*, 1809.

⁷ *R. v. Partridge*, 1836 (*Patteson*, J.). See, also, *Guild's case*, 1828

(*Am.*).

⁸ *R. v. Kingston*, 1830 (*Parke* and *Littledale*, JJ.); *R. v. Cheverton*, 1862 (*Erle*, C.J.).

⁹ *R. v. Parratt*, 1831 (*Alderson*, J.); *R. v. Upchurch*, 1836.

¹⁰ *R. v. Thomas*, 1834 (*Patteson*, J.).

¹¹ *R. v. Thompson*, 1893.

¹² *R. v. Garner*, 1848.

¹³ *R. v. Fennell*, 1881. See *R. v. Mansfield*, 1881.

¹⁴ *R. v. Mills*, 1833 (*Gurney*, B.).

¹⁵ *R. v. Fleming*, 1842 (*Ir.*).

exclude evidence of confessions, that exhortations not to tell lies, but to *speak the truth*, have been deemed likely to induce a *false* acknowledgment of guilt; and, consequently, admissions made after such exhortations have more than once been rejected.¹ But this paradoxical opinion is now happily exploded.² The judges have, however, of late years come to the conclusion that some of the cases of this class have gone too far in the direction of mercy, and have accordingly expressly overruled three of them.³

§ 885. Where the inducement relates to the charge against the prisoner, and comes from a person in authority, it is *not necessary* that it should be *directly held out to the prisoner himself*; but it will equally have the effect of excluding his confession, if there be good reason to believe that it has come to his knowledge, and has influenced his conduct. For instance, where a superior clerk in the post-office said to the wife of a postman, who was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated to him the substance of this statement;⁴ and where, in a case of murder, Government had published a handbill, offering pardon to any one of the offenders, except the person who struck the blow, who should give such information as would lead to the conviction of his accomplices, and it appeared that the prisoner was aware of this offer, and was induced by it to make a confession, it was held that what he said could not be given in evidence.⁵ And where prose-

¹ *R. v. Shepherd*, 1836 (Gaselee, J.); *R. v. Enoch*, 1833 (Park, J.); *R. v. Wood*, 1842 (Ir.) (Crampton, J.); *R. v. Laughner*, 1846 (Pollock, C. B.); *R. v. Bate*, 1871 (Montague Smith, J.).

² *R. v. Reeve*, 1872; *R. v. Holmes*, 1843 (Rolfe, B.); *R. v. Court*, 1836 (Littledale, J.); *R. v. Harris*, 1832; *R. v. Baldry*, 1852; *R. v. Jarvis*, 1867.

³ *R. v. Baldry*, 1852. There, a policeman, who had a prisoner in custody on a charge of felony, said to him, "You need not say anything to criminate yourself; what you say will be taken down and used as

evidence against you." The court held that a confession subsequently made was admissible, overruling, *R. v. Harris*, 1844 (Maule, J.); *R. v. Drew*, 1837 (Coleridge, J.); and *R. v. Morton*, 1843 (id.); and followed *R. v. Reason*, 1872 (Keating, J.); *R. v. Jones*, 1872. But some of the Irish judges, nevertheless, appear to be still inclined to follow the former *mala praxis*. *R. v. Toole*, 1857.

⁴ *R. v. Harding*, 1842 (Ir.).

⁵ *R. v. Boswell*, 1842 (Cresswell, J.). See *R. v. Dingley*, 1845, and *R. v. Blackburn*, 1853.

cutor said to prisoner's brother, "It will be better for him to tell the truth," expecting that the brother would, as he did, communicate to prisoner, a subsequent statement by prisoner was held inadmissible.¹

§ 886.² The rule that the confession must be voluntary, is equally applicable to cases where the prisoner has made a *statement during the preliminary inquiry before the magistrate*. The practice of subjecting the accused to a compulsory examination, and even of putting him to the torture, was familiar to the Roman law,³ and both these modes of proceeding were legal in Scotland so late as the reign of Queen Anne.⁴ In England, too, down to the reign of Charles the first,⁵ the rack was occasionally employed,⁶ and even Lord Coke was prepared to wink at, if not to justify, its use;⁷ while Lord Bacon did not hesitate, as Attorney-General, to superintend, in person, the torture of an aged clergyman.⁸ But, however, just before the Great Rebellion, and in the year 1628, on the trial of Felton for the murder of the Duke of Buckingham, the judges unanimously resolved, that "no such punishment as torture by the rack was known or allowed by our law;"⁹ and no attempt has since been made to revive this atrocious practice.¹⁰

§ 887. Though torture was thus formally abolished before the middle of the seventeenth century, it was not till after the lapse of many years that the common law doctrine, *nemo tenetur prodere seipsum*, was fully recognised, or at least was interpreted to mean,—as it does in the present day,—that all confessions should be strictly *voluntary*, as will be apparent to any careful reader of the State trials. The practice of extorting admissions from prisoners still continues on the continent,¹¹ and certainly is no mean instrument

¹ R. v. Thompson, 1893.

² Gr. Ev. § 224, in part as to first six lines.

³ See B. Carpz. Pract. Rer. Cri., Pars. iii., Quæst. 113, per tot.

⁴ 7 A. c. 21, s. 5 ("The Treason Act, 1708"), abolished torture in Scotland: 2 M'Douall, Inst. (Sc.) 660. For instances of the application of torture there, see 6 How. St. Tr. 1217—1222, and 10 id. 687, 691, 726—747, 751—758.

⁵ Till R. v. Felton, 1628.

⁶ See Campion's case, 1578, cited (Weston, B.) in R. v. Cellier, 1680;

Peacham's case, 1615.

⁷ See Lady Shrewsbury's case, 1612.

⁸ Peacham's case, 1615. See the masterly life of Ld. Bacon, in Ld. Campbell's Lives of the Chanc., 2nd vol., 339—341.

⁹ R. v. Felton, 1628.

¹⁰ In R. v. Cellier, 1680, Weston, B., told the jury, that no person had suffered torture in England since Campion the Jesuit, put to the rack in the 20th of Elizabeth. But this is a strange mistake.

¹¹ The Belgian case of Madame Joniaux at end of 1894 and beginning

for the discovery of truth, but has long been regarded in this country, and always in America, as savouring of unfairness and oppression.

§ 888. The first Acts regulating the examination of prisoners before the magistrates were passed in the reign of Philip and Mary.¹ These statutes, the principles of which have been adopted in several of the United States,² were followed in England by the Criminal Law Act, 1826, and in Ireland by a corresponding Act.³

§ 888A. The statute, however, which now *defines the course of practice* in this country is the Indictable Offences Act, 1848.⁴ It is important that the provisions of the law should be strictly complied with, or (as we shall see presently) the statement by the prisoner may not be admissible. The directions of the Act⁵ are that “*after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read, or cause to be read, to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:—* ‘Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you may say will be taken down in writing, and may be given in evidence against

of 1895, as reported in the Times. See Comments on the case of the Duc de Praslin, in 7 Law Rev. Art. vii.

¹ 1 & 2 Ph. & M. c. 13; 2 & 3 Ph. & M. c. 10; extended to Ireland by 10 C. 1, c. 18.

² See N. York Cr. Code, Part 4, tit. 3, c. 7, §§ 195—199; Bellinger's case, 1832 (Am.); Elmer's Laws of New Jersey, p. 450, § 6; Laws of Alabama (Toulmin's Dig.), tit. 17, ch. 3, § 2, p. 219; Laws of Tennessee (Carruther's and Nicholson's Dig.), p. 426; N. Carolina Rev. Stat., ch. 35, § 1; Laws of Mississippi (Alden and Von Hoesen's Dig.), c. 70, § 5, p. 532;

Laws of Delaware (Rev. Code of 1829), p. 63; Brevard's Laws of S. Carolina, vol. i., p. 460; Laws of Missouri (Revision of 1835), p. 476; Laws of Michigan Territory, p. 215. See, also, Massach. Rev. Stat., ch. 85, § 25; Resp. v. McCarty, 1781 (Am.), (M'Kean, C.J.).

³ Viz., 7 Geo. 4, c. 64. The corresponding statute in Ireland is 9 Geo. 4, c. 54.

⁴ Viz., 11 & 12 V. c. 42. The corresponding statute in Ireland is 14 & 15 V. c. 93. Amended by 52 & 53 V. c. 63.

⁵ In § 18.

you upon your trial ;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing,¹ and *read over to him*, and shall be *signed* by the said justice or justices, and be kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned ;" that is, "the statement of the accused" shall, together with the other documents in the case, "be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice, who is to preside in such court at the said trial, shall order and appoint;"² "and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, *without further proof thereof*, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same : Provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour and nothing to fear from any threat, which may have been holden out to him to induce him to made any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him on his trial, notwithstanding such promise or threat : Provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or

¹ The form is given in Sched. N. to the Act. This form is legalised by § 28 of the Act, but is not rendered necessary. It is as follows :—

"— : A. B. stands charged before the undersigned [*one*] of her Majesty's justices of the peace in and for the [*county*] aforesaid, this day of in the year of our Lord , for that he the said A. B., on at [*&c., as in the caption of the depositions*]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows : 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;' whereupon the said A. B. saith as follows :

[*Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.*]

"Taken before me at the day and year first above mentioned. "A. B.
"S. L."

² § 20.

confession, or other statement of the person accused or charged, *made at any time*, which by law would be admissible as evidence against such person.”¹ The provisions of the Irish Act² are expressed a little differently, but are, in substance, identical with those contained in the English Act, which are set out above.

§ 889. If the provisions referred to above be read in connection with the Form given in the schedule to the Act,³ it seems that, to render a prisoner’s statement strictly valid as a statutory confession, the following circumstances must all have occurred. The charge must have been read to the accused;⁴ all the witnesses must have been examined in his presence,⁵ and the depositions read to him after the examinations were completed;⁶ he must then, and not till then, be twice cautioned by the justice; first, generally,⁷ and, secondly, as to the inefficacy of any promises or threats which may have been formerly held out to him;⁸ his whole statement must next be taken down in his own words;⁹ it must then be read to him,¹⁰ and he must be asked for his signature, as the form in the schedule directs, “get him to sign it if he will,”¹¹ though the Act is silent as to the effect of his refusing to sign it, or even to admit its correctness; the justice must also sign the statement;¹² and this being done, it must be kept with the depositions, and be transmitted, together with them and certain other documents, to the court where the trial is to be had, on or before the opening of such court.¹³

§ 890. Notwithstanding these minute directions, it is not easy to see how the prisoner on his trial could avail himself of any neglect of them on the part of the justice, whether intentional or otherwise; for the statement transmitted, if headed in the manner pointed out by the schedule, is made evidence against the prisoner on its *mere*

¹ § 18.

² 14 & 15 V. c. 93, § 14, clause (n) (amended by 52 & 53 V. c. 63).

³ Cited in last page, n. 1.

⁴ See Sch.

⁵ See Sch., and § 17 of the Act, cited ante, § 479.

⁶ See § 18.

⁷ See § 18. As to the old law, see *R. v. Green*, 1832; *R. v. Arnold*, 1838.

⁸ See first proviso in § 18.

⁹ See Sch.; and *R. v. Roche*, 1841; *R. v. Sexton*, 1822; *R. v. Mallett*, 1830, cited 2 Russ. C. & M. 867.

¹⁰ See § 18; and 3 Russ. C. & M. 500.

¹¹ See Sch.; and 3 Russ. C. & M. 504; *R. v. Lambe*, 1791; *R. v. Thomas*, 1794; *R. v. Foster*, 1827; *R. v. Hirst*, 1828; *R. v. Jellicote*, 1819; *R. v. Pressly*, 1833.

¹² See § 18; and *R. v. Tarrant*, 1833.

¹³ See §§ 18 and 20.

production, and without any proof of the mode in which it was taken down, unless it can be shown that the signature of the justice is a forgery. Whether this was the intention of the Legislature may, perhaps, be doubted ; but such is the apparent effect of the language employed. It is also clear, from the last proviso which is appended to the 18th section of the Act, that any statement made by the prisoner in the magistrate's presence, before the examinations of the witnesses for the prosecution are all completed, may be proved by parol evidence, and will be admissible against him, even though no caution has been previously given.¹

§ 891. The judges originally felt some embarrassment in putting an interpretation on these provisions. It has now, however, been decided that when an examination has been transmitted by the committing magistrate in the statutory form, it becomes admissible without further proof.²

§ 892. But although a written examination, if it purport to be taken in conformity with the Act, and to be signed by the committing magistrate, is in strictness admissible without proof, it still is advisable in serious cases, as a matter of caution, to call either the justice or the clerk, so that it may clearly appear that the proceedings have been conducted in the proper manner.³ Indeed, this course may become actually necessary, if the document has not been drawn out in the form given in the schedule, or if it contains erasures or interlineations which require explanation.⁴ If, too, the prisoner

¹ See post, §. 894, n. ⁸, and, also, *R. v. Stripp*, 1856.

² *R. v. Sansome*, 1850. See S. C. as reported in 3 C. & Kir. 332. As reported in 4 Cox, 203, this case overrules earlier dicta of Alderson, B. (in *R. v. Higson*, 1849), and of Coleridge, J. (after consultation with Cresswell, J., in *R. v. Kimber*, 1849), as to the formalities in cautioning a prisoner, which are required by the Act. In 1 Den. 545, where the same case is reported, the above ruling will not be found: and this is the more remarkable as Mr. Denison was himself counsel in the cause. Parke, B., is stated to have gone so far as to assert that, in his judgment, it would be receivable in evidence, though neither of the cautions was stated to

have been given. Too much reliance, however, should not be placed on this last dictum: and until the law is more clearly defined by judicial construction, it certainly will be prudent for committing magistrates not only to adopt the form set out in the schedule to the Act, but to give the prisoner in all cases the second caution (see supra, § 889), as well as the first.

³ See *R. v. Pikesley*, 1839; *R. v. Wilshaw*, 1841.

⁴ See *R. v. Brogan*, 1834; *R. v. Dwyers*, 1843. In the last edition (1877) of Russell on Crimes, Prentice omits both Brogan's case and Dwyers', but gives no reason for so doing. The cases named cannot be discovered to have been overruled, and appear founded on good sense.

has not signed his name or mark to the paper, some witness, who was present at the inquiry, should, in prudence, be forthcoming to speak to its identity, and to prove that it was read over to the accused, and assented to by him.¹ It would further seem to be necessary to the validity of an examination as evidence per se, that it should appear on the face of the document that it was taken while the prisoner was under examination on a charge of felony or misdemeanor, or of suspicion of one of those crimes, and that the justices signing it were acting as justices pursuant to statute.² Whether these facts must appear by a separate caption is a point which is not yet determined. The form in the schedule gives a separate caption, but that form, though legalised, is not rendered necessary by the Act;³ and under the old law, provided the examination was written on the same paper as the depositions, the heading at the commencement was held to apply to all the statements contained in the document.⁴ In this respect the rule agreed with that which governs examinations taken under the Poor Law Acts; where it is not necessary,—as was once supposed,⁵—that such examinations should have distinct captions, but it will suffice to state the names of all the witnesses in the first caption.⁶

§ 893. As the admissibility of statutory examinations without proof rests on the presumption that the justices have done their duty, it seems to follow that no evidence can be received tending to *contradict* or *vary* the statements contained in the documents as returned. This was the law before the Act under discussion was passed,⁷ and that Act does not appear to have introduced any change in the practice.⁸ Whether this presumption is of so conclusive a character as to exclude all parol evidence, which is tendered with the view of *adding* to the written examination, is a question of doubt and difficulty; but as the Act renders it incumbent on the justice, not only to reduce to writing so much of the prisoner's

¹ See *R. v. Reading*, 1836; *R. v. Hearn*, 1841; *R. v. Hopes*, 1835; *R. v. Haines*, 1830. Prentice, in the last edition of Russell, also omits this case, but the omission is liable to the same criticism as those in the last note.

² See *R. v. Tarrant*, 1833.

³ § 28 of the Act.

⁴ *R. v. Johnson*, 1847 (Alderson, B.); *R. v. Young*, 1850.

⁵ *R. v. Ratcliffe Culey*, 1846.

⁶ *R. v. St. Michael's, Coventry*, 1848.

⁷ *R. v. Walter*, 1836; *R. v. Morse*, 1838.

⁸ *R. v. Bond*, 1850.

examination as may be *material*,¹ but to take down his *whole* statement,² it would seem right to hold that he must be presumed to have done this, and that no parol evidence of any additional statement *made at the same time* can be received.³

§ 894. If, however, parol evidence of such additional statement be admissible on the part of the prosecution, the prisoner, *à fortiori*, would seem entitled to pray it in aid of his defence.⁴ Whatever may be the rule upon this point, it is clear, from the last proviso, to § 18 of the Act, that⁵ a written examination will not exclude parol evidence, either of an extra-judicial confession, previously or subsequently made;⁶ or of a statement which has been made before the justice on a former investigation, and not incorporated in the examination returned;⁷ or of anything incidentally said by the prisoner while the witnesses were deposing against him, even though it were addressed to the magistrate himself,⁸ and no caution had been previously given.⁹ So, if it can be proved that the prisoner's examination was not reduced to writing, parol evidence of what he said before the magistrates will be received;¹⁰ though the presumption that all things were done as the law requires renders it necessary for the Crown to give clear evidence on this point;¹¹ and the judges more than once have required that the magistrate or his clerk should be called to prove the negative fact.¹² Again, if the written examination be shown to have been lost,¹³ or if it be wholly inadmissible

¹ This was the language of the old law. See 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 3.

² See 11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 18, and Sch. N., cited ante, § 888.

³ See, however, Rowland v. Ashby, 1825; R. v. Harris, 1832; Leach v. Simpson, 1839 (Parke, B.).

⁴ This view of the law is sanctioned, not only by the case of Venafrá v. Johnson, 1834 (Gaselee, J., after consulting judges of C. P.), but also by the authority of Mr. Starkie (3 St. Ev. 787) and Mr. Phillipp (2 Ph. Ev. 82—88).

⁵ Gr. Ev. § 227, in part.

⁶ R. v. Carty, 1797, cited in Joy on Conf. 97 (Ir.), and McNally, Ev. 45 (Ir.); R. v. Reason, 1722 (Eyre, J.).

⁷ R. v. Wilkinson, 1838 (Littledale, J., and Parke, B.); R. v. Bond, 1850.

⁸ R. v. Bond, 1850; R. v. Spilbury, 1835 (Coleridge, J.); R. v. Johnson, 1829 (Parke, B.); R. v. Moore, 1831 (id.); R. v. Hooper, 1842 (Erskine, J.); all cited in 2 Russ. C. & M. 879. But see R. v. Weller, 1846 (Platt, B.). Sed qu. as to this case.

⁹ R. v. Stripp, 1856.

¹⁰ R. v. Hall, 1790, cited by Grose, J., in R. v. Lamb, 1784; R. v. Huet, 1798.

¹¹ R. v. Fearshire, 1779; R. v. Jacobs, 1784; R. v. Hinxman, 1791 (Ashhurst, J.), and R. v. Fisher, 1785 (Heath, J.); R. v. M'Govern, 1852.

¹² R. v. Packer, 1829 (Parke, J.), and R. v. Phillips, 1831 (Bosanquet, J.), both cited 2 Russ. C. & M. 876, n. (p); Phillips v. Winburn, 1830 (Tindal, C.J.).

¹³ R. v. Reason, 1722 (Eyre, J.).

under the statute by reason of irregularity, parol evidence will be received to prove what the prisoner voluntarily disclosed ;¹ and in this last event of the examination being rejected for informality, it may still be used, either as a contemporaneous writing, to refresh the memory of the witness who wrote it,² or if it be signed by the prisoner, it will be receivable at common law as his confession, the signature being first proved, and it being shown that he knew what it contained.³

§ 895. One species of irregularity, however, is said⁴ to not only exclude the examination as evidence per se, but also to prevent its being used to refresh the writer's memory, and to shut out all parol testimony of what was said on the same occasion. The irregularity in question is where the prisoner's *examination purports* to have been *taken upon oath*.⁵ This rule rests upon two principles of law, the policy of both of which is very questionable. The first is the principle that the confession of a prisoner must be voluntary: and it is contended, that a statement made under oath is not so. This is certainly true in one sense, though not in that in which it is used by the advocates for exclusion. A confession which is not voluntary is excluded, because it may be untrue. A confession made upon oath cannot be rejected on this ground; since it is absurd to contend that an oath, which in all other cases is rightly considered as the most effectual test of truth, should, if taken by a prisoner, be regarded as an inducement to falsehood. But then, it is urged, *nemo tenetur prodere seipsum*; a prisoner should not be compelled to criminate himself. Admitted; but a prisoner, though sworn, is no more bound to criminate himself, than if he were simply interrogated without any oath being administered to him. He has still full liberty to decline to make any explanation or declaration whatever: though if he does consent to

¹ *R. v. Reed*, 1829 (Tindal, C.J.).

² *R. v. Laver*, 1722 (Pratt, C.J.); *R. v. Watson*, 1851; *R. v. Watkins*, 1831 (Bosanquet, J.); *R. v. Tarrant*, 1833 (Patteson, J.); *R. v. Pressly*, 1833 (id.); *R. v. Dewhurst*, 1825, and *R. v. Hirst*, 1828 (Bayley, J.); *R. v. Jones*, 1828 (Bayley and Gaselee, JJ., and Vaughan, B.); *R. v. Bell*, 1831 (Gaselee, J., and *Ld. Tenterden*).

³ See *R. v. Sansome*, 1850.

⁴ But see *R. v. Chidley*, 1860, post, § 899; argument, *infra*, against this view.

⁵ *R. v. Smith*, 1816 (Le Blanc, J.); *R. v. Davis*, 1833 (Gurney, B.); *R. v. Bentley*, 1833 (id.); *R. v. Rivers*, 1835 (Park, J.); *R. v. Owen*, 1840 (Gurney, B.); *R. v. Pikesley*, 1839 (Parke, B., and Bosanquet, J.); *R. v. Wheeley*, 1838 (Alderson, B.).

answer the questions put to him, he may, perhaps, incur the penalties of perjury should he knowingly utter what is false.¹ "But a friendless accused is not aware of the law in his favour." This may be so: but in what other case is a party at liberty to set up his ignorance of the law? If the maxim of the common law, *ignorantia legis neminem excusat*, be sound, as it unquestionably is; and if, consequently, the defence of acting in ignorance cannot protect an offender even from punishment; on what principle of justice is the accused entitled to say, "I confessed my crime, and have sworn that my statement is true; but you, the jury, must not hear what I said, because I was not aware of the existence of a rule of law, which would have expressly justified me in holding my peace"?

§ 896. The second principle of law on which the rule under discussion rests is, that as the justices, in discharge of their duty, ought to make a true return of what took place before them, the court will presume that they have thus acted; and, therefore, as the deposition does not purport to be upon oath, parol evidence to vary or contradict the written document so returned will not be admitted. Now, the fallacy of this reasoning is obvious. In the first place, the presumption, *omnia ritè esse acta*, is not conclusive in ordinary cases, and ought not to be so in this; and next, even supposing that it should, it does not apply. The duty of the justice is two-fold: first, to examine the prisoner without administering an oath to him;² and, secondly, to make a true return of his statement. If, then, an examination be returned, which purports to have been taken on oath, the presumption that this return is true is at least counterbalanced by the opposite presumption, that the justice has discharged his duty by not swearing the prisoner; and the result is, that parol evidence should be received, in order to ascertain which presumption is in accordance with the fact. The principle, that written documents shall not be varied or contradicted by parol testimony, may apply to the body of the examination, which is taken down by the justice or his clerk, and is expressly assented to by the accused; but it should not extend

¹ This, however, seems doubtful, as the magistrate has no authority to administer such an oath.

² B. N. P. 242.

to the mere formal heading or conclusion of the examination, which is not, or at least need not be, read over to the prisoner, or admitted to be correct by him; and a mis-statement in which may, and, in fact, notoriously does, often arise from the inadvertence or carelessness of the magistrate or his clerk. If the justice were liable to a penalty, as he ought to be, for taking a prisoner's confession on oath, he would clearly be entitled, if sued or prosecuted for such penalty, to show that, though the examination purported on its face to have been taken on oath, the prisoner was not in fact sworn; and no real danger could be apprehended, but on the contrary much benefit would accrue to the administration of criminal justice, if a similar course of proceeding were allowed, when the question was whether a confession was receivable or not. However, as before stated, the authorities in favour of rejecting examinations which purport to be upon oath are so numerous and consistent, that, without the aid of the Legislature, little hope can be entertained that a more satisfactory rule will be adopted in practice.¹

§ 897. Where a prisoner, on being mistaken for a witness, was partially examined upon oath, but, the mistake being discovered, the deposition was destroyed,—a subsequent statement made by him, after due caution from the magistrate, was held to be clearly admissible.²

§ 898. Indeed, the rule excluding sworn confessions seems strictly confined, at common law, to the case of a statement, made by the party upon oath, while *under examination as a prisoner* respecting the criminal charge.³ Thus, on an indictment for forging a bill of exchange, depositions of the prisoner, taken on oath before commissioners of bankruptcy, *after* a prisoner has been charged before a magistrate with forging the bill, are admissible

¹ See cases cited ante, § 895, n. 5. See, also, No. 57 of Law Mag. vol. 28, pp. 13—19, where the anomalies in the present law of confessions are amusingly exposed.

² *R. v. Webb*, 1831 (Garrow, B.).

³ See Joy on Conf. 62—68 (Ir.). One or two decisions by Gurney, B., might be cited, seeming to extend the rule somewhat further, and to render inadmissible confessions made on oath to magistrates or coro-

ners by parties, who, after being examined *as witnesses*, have themselves been committed for trial (*R. v. Lewis*, 1833 (Gurney, B.); *R. v. Davis*, 1833 (id.); *R. v. Owen*, 1840 (id.). See, also, *R. v. M'Hugh*, 1857 (Ir.) (Pennefather, B., diss.)); but these decisions have been overruled by subsequent cases. (See *R. v. Gillis*, 1866 (Ir.) (O'Hagan, J.); *R. v. Coote*, 1873 (Sir R. Collier)).

against him.¹ Where a bankrupt had been examined before a commissioner touching some matter irrespective of his trade dealings, and had not objected to answer the questions put, his examination was held to be admissible evidence against him on a subsequent criminal charge.² Where a trader was indicted for obtaining property on credit, within four months before his liquidation, under the false pretence of dealing in the ordinary way of his trade,³ his examination taken in liquidation under § 97 of the Bankruptcy Act, 1869,⁴ was admitted in evidence against him;⁵ and on a charge of arson, depositions made by the prisoner when under examination as a witness respecting the origin of the fire, have been read against him.⁶

§ 899. Similarly, on the trial of an indictment for conspiracy, the answers in Chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, have been received.⁷ An affidavit sworn by him in a suit in Doctors' Commons has also been given in evidence against a prisoner;⁸ and depositions made by prisoners, when examined as witnesses against other persons on criminal charges, have several times been admitted against themselves.⁹ Upon a trial for manslaughter, the prisoner's deposition on oath, taken by the coroner upon the inquest is, moreover, evidence against him.¹⁰ So, the testimony, given by a prisoner before a committee of the House of Commons, may be read against him on a criminal trial.¹¹ A case¹² which is sometimes

¹ *R. v. Wheeler*, 1838. See *R. v. Cherry*, 1871.

² *R. v. Sloggett*, 1856. See, also, *R. v. Scott*, 1856; and *R. v. Hillam*, 1872.

³ Contrary to § 11 of the Debtors Act, 1869 (32 & 33 V. c. 62), amended by 53 & 54 V. c. 71, § 26.

⁴ 32 & 33 V. c. 71.

⁵ *R. v. Widdop*, 1872.

⁶ *R. v. Coote*, 1873.

⁷ *R. v. Goldshede*, 1844 (Ld. Denman); *R. v. Highfield*, 1828 (Vaughan, B.), cited 2 Russ. C. & M. 859.

⁸ *R. v. Walker*, 1806 (Ld. Ellenborough), cited (Gurney, B.), in *R. v. Lewis*, 1833.

⁹ *R. v. Haworth*, 1830 (Parke, J.). In one case the very point stated in note, ante, § 898, note³, to have been decided by Gurney, B., was distinctly overruled by Cockburn, C. J.; and

a deposition was admitted against a prisoner, *who had made it before the justices while under examination as a witness*, and who, in consequence of its self-criminating character, had been committed to take his trial: *R. v. Chidley and Cummins*, 1860. See, also, *R. v. Colmer*, 1864 (Martin, B.); *R. v. Tubby*, 1833 (Vaughan, B.); *R. v. Braynell*, 1850.

¹⁰ *R. v. Bateman*, 1866 (Martin, B., and Willes, J.).

¹¹ *R. v. Mercer*, 1818 (Abbott, J.). This case is, however, of little authority on the subject under discussion, as the evidence could not then have been given on oath. See Ld. Ten-terden in *R. v. Gilham*, 1828.

¹² *R. v. Britton*, 1833 (Patteson and Alderson, JJ.).

cited as a decision conflicting with the above proposition, is in fact no hostile authority, as it only determined that on an indictment against a bankrupt for not disclosing his effects under the commission, his balance-sheet, which was only admissible in the event of the commission being valid, could not be given in evidence to prove the petitioning creditor's debt as a part of the commission.¹

§ 899A. On the whole it seems clear, that if a prisoner, on being examined as a witness, has consented to answer questions, to which he might have demurred as tending to criminate himself, and which, therefore, he was not bound to answer, his statement will be deemed voluntary, and, as such, may be subsequently used against himself for all purposes,² unless he be protected by the special language of some statute.³

§ 900. Although, however, a prisoner cannot, at common law, exclude his own confession, on the sole ground that it was made by him while a witness under oath, yet, if he can prove that, when questions tending to criminate him were put, he claimed the protection of the court, and was still compelled to answer, his answers cannot be given in evidence against himself.⁴ Testimony so obtained is excluded, not, as it seems, because it may possibly be untrue, but because the right of the witness to be silent has been infringed; and it is deemed expedient, on grounds of public policy, to uphold the broad legal maxim, that no man shall be forced to criminate himself.⁵

§ 901. The statute prescribing the duties of coroners enacts that every coroner shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall certify and subscribe the same, and deliver it to the officer of the court in which the trial is to be,⁶ and it also contains provisions as to the issue of a warrant by the coroner for the arrest of every person charged on an inquisition found before him with murder or manslaughter.⁷ On various occasions, too, it has been assumed, that a

¹ Patteson, J., in *R. v. Wheeler*, 1838, explaining that decision.

² But see *R. v. Gillis*, 1866 (Ir.), where a large majority of the Irish judges took a different view of the law. Sed qu.

³ See post, § 1455, as to these statutes.

⁴ *R. v. Garbett*, 1847. See post,

§§ 1453 et seq., as to what questions a witness may refuse to answer.

⁵ *R. v. Garbett*, 1847 (Alderson, B.). But see cases cited in § 898, ante.

⁶ 50 & 51 V. c. 71 ("The Coroners Act, 1887"), § 4; 9 G. 4, c. 74, §§ 4 and 6, Ir.

⁷ *Id.* § 5.

C. X.] PROPERTY FOUND IN CONSEQUENCE OF CONFESSION.

coroner has the same authority to take the examination of a prisoner as a magistrate.¹

§ 902.² When, *in consequence of information obtained from the prisoner in an improper manner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered*, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being confirmed by the finding, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not be competent to inquire whether he confessed that he had concealed it there.³ So much of the confession as relates *distinctly* to the fact discovered by it may be given in evidence, since this part of the statement, for the reasons already given, cannot have been false.⁴

§ 903.⁵ If, too, a prisoner be persuaded, by improper inducements, to confess, and *to himself deliver up the goods stolen*, his declarations, contemporaneous with and explanatory of the act of delivery, though they may amount to a confession of guilt, will be admissible.⁶ But whatever he may have said at the same time, not qualifying or explaining the act of delivery, must be rejected. And if,—notwithstanding the prisoner's confession thus improperly

¹ *R. v. Reid*, 1829 (Tindal, C.J.); *R. v. Roche*, 1841 (Ld. Denman); Brogan's case (undated) (Ld. Lyndhurst). See remarks ante, notes to § 892.

² Gr. Ev. § 231, in great part.

³ Ph. Ev. 411; *R. v. Warickshall*, 1783; *R. v. Mosey*, 1784 (Buller, J., and Perryn, B.); *R. v. Lockhart*, 1785; *R. v. Gould*, 1840 (Tindal, C.J., and Parke, B.); *R. v. Thurtell*, 1822, cited Joy on Conf. 84 (Ir.); *R. v. Cain*, 1839 (Ir.) (Torrens, J.); *Com. v. Knapp*, 1830 (Am.).

⁴ *R. v. Butcher*, 1798; and see the cases cited above, n. ³. In Harvey's case, 1800, Lord Eldon laid down

the rule somewhat more strictly than it is stated in the text, saying that where the knowledge of any *fact* was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But it is submitted that the result of the authorities cited in the preceding and the following note is as stated in the text.

⁵ Gr. Ev. § 232, in part.

⁶ *R. v. Griffin*, 1809; *R. v. Jones*, 1809.

induced, and any acts done in furtherance of the discovery,—*the search* for the property or person in question be *ineffectual*, no proof of either the confession or the acts can be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon; and the acts done under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct.¹

§ 904. A prisoner is not liable to be affected by the *confessions of his accomplices*.² So strictly is this rule enforced, that where a person is indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, is no evidence of that fact as against the receiver;³ and it would be the same, it seems, if both parties were indicted together, and the principal were to plead guilty.⁴

§ 905.⁵ On similar grounds, no person is, in general, answerable criminally for the acts of his servants or agents, whether he be the accused or the principal in the matter, unless a criminal design be brought home to such person himself.⁶ The act of the agent or servant may be shown in evidence, as proof that such an act was done; for a fact must be established by the same evidence, whether it be followed by a criminal or civil consequence.⁷ But it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the principal may be affected by the fact, when so established. For though the wrongful or fraudulent act of the agent may involve his principal civilly,⁸ it cannot

¹ R. v. Jenkins, 1822.

² So is the Roman law. "Confessio unius non probat in præjudicium alterius, quia aliàs esset in manu confitentis dicere quod vellet, et sic jus alteri quæsitum auferre, quando omninò jura prohibent; etiamsi talis confitens esset omni exceptione major. Sed limitabis, quando inter partes convenit parere confessioni et dicto unius alterius." 1 Masc. de Prob., Concl. 486, p. 409. See ante, §§ 593, 594.

³ R. v. Turner, 1832 (all the judges).

⁴ Id., citing an anonymous decision of Wood, B.

⁵ Gr. Ev. § 234, in great part.

⁶ See Cooper v. Slade, 1857-8, H. L. (Ld. Wensleydale). But even in criminal cases there are certain exceptions to the general rule: see ante, § 115.

⁷ See ante, § 724.

⁸ Barwick v. Eng. Jt. Stock Bk., 1867; Proudfoot v. Montefiore, 1867; Moore v. Metrop. Rail. Co., 1872; Mackay v. Com. Bk. of New Brunswick, 1874, P. C.; Swire v. Francis, 1877; Burmah Trading Corp. Lim.

convict him of a crime, unless proof be also given that the principal has directed, or, at least, assented, to such act.¹ Where it was proposed to show that an agent of the prosecutor, not called as a witness, had offered a bribe to an intended witness, who, however, had not been called, the evidence was held inadmissible; though the general doctrine, as above stated, was recognized.²

§ 906. The rule thus generally laid down is open to an apparent exception in the case of the proprietor of a newspaper, who is, *primâ facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge.³ Yet even here the defendant is, by Lord Campbell's Act,⁴ now entitled to be acquitted if he prove that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part.

§ 907. Confessions, like admissions, may be inferred from the *conduct* of the prisoner, and from his *silent acquiescence* in the statements of others, made in his presence, respecting himself;⁵ provided they were not made either before a magistrate, or under circumstances such as to naturally prevent the prisoner from replying.⁶ In both the cases just instanced, of course, there can be no admission by silence. In the well-known case of Dr. Newman,⁷ on an information for libel, to which truth was pleaded as a justification under Lord Campbell's Act,⁸ the defendant

v. Mirza Mahomed Ally, &c., 1878, P. C. See *Ld. Bolinbroke v. Local Board of Health of Swindon*, 1874; *Shaw v. Port Phillip, &c.*, 1884.

¹ *Ld. Melville's case*, 1806; *The Queen's case*, 1820, H. L.; ante, § 724.

² *The Queen's case*, 1820, H. L.

³ *Ld. Tenterden* put this strongly (being apparently prepared to make the criminal liability even more than *primâ facie*) in the following remarks:—"Surely, a person who derives profit from, and furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was

individually concerned in the particular publication." *R. v. Gutch*, 1829. See, further, as to the acts of agents, ante, § 115.

⁴ 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 7; *R. v. Holbrook*, 1877; S. C. on second trial, 1878. See, also, *R. v. Ramsay*, 1883.

⁵ *R. v. Bartlett*, 1837 (Bolland, B.); *R. v. Smithies*, 1832 (Gaselee and Parke, JJ.); ante, §§ 809—816. See *St. Matthew*, ch. 26, vv. 60—63, and ch. 27, vv. 12—14.

⁶ *R. v. Appleby*, 1821 (Holroyd, J.); *Melen v. Andrews*, 1829 (Parke, B.); *Joy on Conf. (Ir.)*, 77—80; ante, § 738.

⁷ *R. v. Newman*, 1822.

⁸ 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 7.

tendered evidence to prove that the very imputations in the libel had been previously published in another work, and that the prosecutor, though well aware of this, had taken no steps to obtain redress ; but the evidence was rejected as too vague to be any proof of acquiescence.

AMERICAN NOTES.

Confessions. — An admission of the commission of a criminal offence is, technically, a confession. Such an admission is, under proper circumstances, competent evidence against the maker. *State v. Carrick* 16 Nev. 120 (1881); *Blackburn v. Com.*, 12 Bush, 181 (1876); *Murphy v. People*, 63 N. Y. 590 (1876); *State v. George*, 93 N. C. 567 (1885); *U. S. v. Kirkwood*, 5 Utah, 123 (1886); *State v. Phillips*, 117 Mo. 389 (1893); *Bell v. State*, 31 Tex. App. 276 (1892); *State v. Chambers*, 45 La. Ann. 36 (1893); *Walker v. State*, 136 Ind. 663 (1893).

"The confessions of prisoners are received in evidence upon the presumption that a person will not make a false statement, which will militate against himself." *Brown v. State*, 32 Miss. 433, 450 (1856); *Basye v. State*, 45 Neb. 261 (1895). It is not necessary that a witness should remember all the confession. *State v. Madison*, 47 La. Ann. 30 (1895).

CONFESSIONS AND ADMISSIONS. — Statements by one accused of crime as to the existence of particular facts are designated as admissions. Confession is the term reserved for the acknowledgment of guilt.

It is error to confuse the two in a charge to the jury. *Fletcher v. State*, 90 Ga. 468 (1892).

"The term admission is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term confession being generally restricted to acknowledgments of guilt. . . . The rules of evidence are in both cases the same." *Colburn v. Groton*, 66 N. H. 151, 154 (1889); *Taylor v. State*, 37 Neb. 788 (1893); *Mora v. People*, 19 Colo. 255 (1893). So acknowledgment of the possession of goods belonging to a murdered woman is not a confession of murder. "He may have been guilty of no other or different crime than that of which the witness admits his own guilt, namely, receiving and concealing goods taken from the murdered woman. The fact of his possession of the goods raised a powerful presumption of his guilt of the murder. But his admission of such possession was in no sense a confession of guilt. It will not do to say that one on trial for a felony confesses his guilt by admitting circumstances tending, however strongly, to establish guilt. A confession of guilt is an admission of the criminal act itself, not an admission of a fact or circumstance from which guilt may be inferred. *State v. Glynden*, 51 Ia. 463." *State v. Red*, 53 Ia. 69 (1880). "A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. An admission of a fact, not in itself involving criminal intent, is not to be rejected

as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt." *People v. Parton*, 49 Cal. 632 (1875). "All parts of the confession, inculpatory or exculpatory, should be weighed together." *State v. McDonnell*, 32 Vt. 491, 532 (1860).

But the witness can give all he heard even if he did not hear the entire confession. *People v. Daniels*, 105 Cal. 262 (1894).

On a defence of alibi the defendant's admission of the speed of his horse is competent. "His sayings are admissible against himself." *Fraser v. State*, 55 Ga. 325 (1875). The fact that the defendant offered \$60 to settle the case is competent. *State v. Bruce*, 33 La. Ann. 186 (1881).

Only such portion of a confession is competent as relates to the offence under investigation. The prosecution cannot introduce admissions by a defendant of general bad character. *Com. v. Campbell*, 155 Mass. 537 (1892).

JUDICIAL AND EXTRA-JUDICIAL CONFESSIONS. — A distinction has been attempted between confessions made in court and those made *in pais*. Thus the supreme court of Missouri say: "Confessions are divided into two classes, namely, judicial and extra-judicial. Judicial confessions are those which are made before the magistrate or in court, in due course of legal proceedings, and it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statutes, and the plea of guilty made in open court to an indictment. Either of these is sufficient to found a conviction upon, even if it be followed by sentence of death, they being deliberately made, with the advice of counsel, and under the protecting caution and oversight of the judge. Extra-judicial confessions are those which are made by the party elsewhere than before a magistrate, or in court, this term embracing not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied.

"Whether extra-judicial confessions, uncorroborated by any other proof of the corpus delicti, are of themselves sufficient to found a conviction of the prisoner upon, has not only been doubted, but, in the best considered cases, denied." *State v. German*, 54 Mo. 526 (1874). See also *Pitts v. State*, 43 Miss. 472 (1871).

FORM OF CONFESSION. — The confession may be in the form of evidence given in another case. *Dickerson v. State*, 48 Wis. 288 (1879); *Alston v. State*, 41 Tex. 39 (1874); *Anderson v. State*, 26 Ind. 89 (1866).

Or as evidence against another before the grand jury. *State v. Broughton*, 7 Ired. (N. C.) 96 (1846).

Or in a plea of guilty before the lower court. *State v. Bowe*, 61 Me. 171 (1872).

Or on a former trial of the same case. "The statements made by the defendant while testifying at a former trial were competent, either as admissions or for the purpose of contradicting him. They were voluntary statements, in regard to his connection with the transaction, and it is immaterial where or when they were made." *Com. v. Reynolds*, 122 Mass. 454 (1877). Or before a coroner at a preliminary inquest. *Teachout v. People*, 41 N. Y. 7 (1869); *Snyder v. State*, 59 Ind. 105 (1877); *State v. Gilman*, 51 Me. 206 (1862). So of evidence at a fire inquest. *Com. v. Bradford*, 126 Mass. 42 (1878).

Or before a committing magistrate. *State v. Branham*, 13 S. C. 389 (1879).

Such confessions are regarded as voluntary, especially where the declarant has been cautioned. *Teachout v. People*, 41 N. Y. 7 (1869); *State v. Gilman*, 51 Me. 206 (1862); *Com. v. Clark*, 130 Pa. St. 641 (1889); *Com. v. Bradford*, 126 Mass. 42 (1878); *State v. Branham*, 13 S. C. 389 (1879); *Snyder v. State*, 59 Ind. 105 (1877).

To the opposite effect, see *State v. Garvey*, 25 La. Ann. 191 (1873).

On an indictment for bigamy, the fact of the prior marriage may be proved by an endorsement on a photograph "your dear husband." *State v. Behrman*, 114 N. C. 797 (1894).

And it has been held that where A. testified against B. jointly indicted with himself but tried separately as confessions as to his connection with the offence cannot be used against him on his own trial. "That he was cautioned by the circuit judge, at the time he testified against Robertson, that he need not tell about his own connection with the crime, does not affect the result. The principle is, that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it, in a prosecution of him for the same crime; because the fact that he is under oath, of itself, operates as a compulsion upon him to tell the truth, and the whole truth, and his statement, therefore, cannot be regarded as free and voluntary." *Jackson v. State*, 56 Miss. 311 (1879).

If the confession has been reduced to writing, it becomes a written instrument within the meaning of the "best evidence" rule. "When confessions are taken by a trial justice, in writing, signed by the parties, such evidence is the best evidence upon the subject, and if such confessions are relied upon against them, the defendants are entitled to have them produced in the very terms in which they were made. From the infirmity of memory there is always more or less uncertainty about parol testimony, especially

in reference to declarations — mere spoken words. Even in civil cases the rule is that parol testimony is not admissible to explain, vary or add to written instruments, which must speak for themselves. In criminal proceedings there is even more reason that only the best and most reliable evidence should be allowed. There may have been in the written confessions some qualifications or explanations, and, we think, when demanded by the defendants, they should have been offered. It was error to receive parol testimony of confessions made in writing where there was no obstacle in the way of the written confessions being offered." *State v. Branham*, 13 S. C. 389, 397 (1879). To the same effect, *Cicero v. State*, 54 Ga. 156 (1875); *Wright v. State*, 50 Miss. 332 (1874). A letter is none the less competent as an admission that it is not signed. *State v. Winningham*, 124 Mo. 423 (1894). Or because written at the dictation of another and signed by that other. *State v. Sibley*, (Mo.) 31 S. W. 1033 (1895).

CONFESSION BY SILENCE. — A confession, like any other admission, may be in the form of a declaration made in presence of the accused under circumstances calling for a reply; e. g., by a fellow prisoner. *Murphy v. State*, 36 Oh. St. 628 (1881); *People v. Estrado*, 49 Cal. 171 (1874); *Haberty v. State*, 8 Oh. C. Ct. Rep. 262 (1894); *Sparf v. U. S.*, 156 U. S. 51 (1895); *Com. v. Trefethen*, 157 Mass. 180 (1892).

Failure to reply to an accusation of guilt is, if a reply is fairly called for, a competent fact in the nature of a confession. *State v. Reed*, 62 Me. 129, 141 (1874); *Com. v. Brown*, 121 Mass. 69 (1876); *Kelley v. People*, 55 N. Y. 565 (1874); *State v. Bowman*, 80 N. C. 432 (1879); *Drumright v. State*, 29 Ga. 430 (1859); *State v. Belknap*, 39 W. Va. 427 (1894); *Brown v. State*, 32 Tex. App. 119 (1893).

"Where an individual is charged with an offence, or declarations are made, in his presence and hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speak, it is the province of a jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained. At most, silence under such circumstances is but an implied acquiescence in the truth of the statements made by others, and thus presumptive evidence of guilt, and in some cases it may be slight, except as confirmed and corroborated by other circumstances. But it is some evidence, and therefore, except in those cases where the statements are made upon an occasion and under circumstances in which the individual sought to be affected could not with propriety speak, as in the progress of a judicial investigation, or in a discussion between third persons not addressed to or intended to affect the accused or induce any action in respect to him, so that for him

to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted." *Kelley v. People*, 55 N. Y. 565 (1874).

So an uncontroverted statement, made in a prisoner's presence at a judicial hearing, is not competent as an admission by him, "being made in the progress of an investigation before a judicial officer, when silence, if not required, was at least justified as a matter of decorum." *Bell v. State*, 93 Ga. 557 (1894).

It is no objection to the admissibility of such statements that they were made while the accused was under arrest. *Kelley v. People*, 55 N. Y. 565 (1874).

But, as has been said, the circumstances must be such as to make a reply proper. *Slattery v. People*, 76 Ill. 217 (1875); *Kelley v. People*, 55 N. Y. 565 (1874); *State v. Murray*, (Mo.) 29 S. W. 700 (1895); *Com. v. Trefethen*, 157 Mass. 180 (1892).

"The inference that silence is tantamount to an admission of guilt must rest upon the idea of acquiescence, and it is not consistent with sound reason to imply an acquiescence from silence, unless the circumstances are such as to afford the party an opportunity to act or speak, but such, also, as would naturally call for some action or reply from prudent men similarly situated. The rule is well and tersely settled in *Com. v. Brown*, 121 Mass. 69, as follows: 'A statement made in the presence of a defendant, to which no reply is made, is not admissible against him, unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply unless he intends to admit it. But, if he makes a reply wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence. *Com. v. Kenney*, 12 Metc. (Mass.) 235.'" The circumstance that the accused is in custody, while entitled to weight, will not, of itself, exclude the statement, if the circumstances otherwise properly called for a reply or denial by him. *Com. v. Brown*, 121 Mass. 69; *Murphy v. State*, 36 Oh. St. 628; *Kelley v. People*, 55 N. Y. 565; *People v. Wentz*, 37 N. Y. 303; *McKee v. People*, 36 N. Y. 113; *Com. v. Cuffee*, 108 Mass. 285; *State v. Murray*, (Mo.) 29 S. W. 700 (1895).

And it must be proved that the defendant understood what was said. *Sauls v. State*, 30 Tex. App. 496 (1891).

The entire rule has been severely criticised. Thus, the supreme court of South Carolina say of a charge "that if a party hears a criminal charge against himself, and made in his presence, and says nothing, it is an admission on his part, and, in the eye of the law, the party accepts that charge as his confession," as follows: "The effect of this charge was to give the silence of the parties the legal force and effect of confession of guilt. It must, in this

respect, be distinguished from the proposition that the conduct of parties under accusation of crime may be given to the jury, as circumstances to be weighed in connection with the question of guilt or innocence. To give the silence of parties such legal effect, is equivalent to holding that every person accused of crime by any person, regardless of time, place or circumstance, is bound to deny such accusation and affirm his innocence. It is clear that the law imposes no such obligation on a party accused; but, on the contrary, it is his right to stand mute, and the burden of showing the guilt is on those that make the accusation." *State v. Edwards*, 13 So. C. 30 (1879).

In like manner, the supreme court of Alabama say: "The evidence in the cause before us was properly admitted. But the charge of the court upon it was calculated to mislead the jury, concerning the weight it was entitled to. They ought not to have been instructed, 'That the fact that the person who is charged with the commission of a crime says nothing, but remains silent, is a circumstance to which the jury may look as a confession of guilt.' It is often a circumstance, the significance of which may be wholly misunderstood; and it ought, therefore, always to be questioned very carefully, if not distrustingly, by a jury." *Campbell v. State*, 55 Ala. 80 (1876).

FORCE OF CONFESSIONS. — The probative effect of confessions is frequently more apparent than real. Instances of untruthful self-accusation of the gravest offences have been not infrequent. Cautions by the court seem therefore entirely justified. *State v. McDonnell*, 32 Vt. 491, 532 (1860).

In *Brown v. State*, 32 Miss. 433 (1856), the Mississippi court of appeals say: "We have no hesitation in saying that the 14th instruction granted in behalf of the prosecution was erroneous. That instruction is in the following words: 'Confessions made by a person charged with an offence, when made voluntarily, and not obtained by force, fraud, or threats, are regarded by the law as the highest and most satisfactory character of proof. If, therefore, the jury believe from the confessions of defendant, as given in evidence, that defendant shot Tatum, the deceased, at a time when he knew that Tatum had no power to do him any injury, then such shooting was unlawful, and defendant is guilty of either murder or manslaughter, according to his intention at the time of shooting.'

The confessions of prisoners are received in evidence upon the presumption that a person will not make a false statement, which will militate against himself. And while the elementary writers, and the courts, have not entirely agreed upon the weight to be given to this species of evidence, it is admitted by all that it should be received with great caution. 'For,' says Blackstone,

who maintained that confessions in cases of felony, were the weakest and most suspicious of all testimony; 'they are very liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately or reported with precision, and incapable in their nature, of being disproved by other negative evidence. 4 Com. 357. Subject however, to the proper caution in receiving and weighing them, 'it is generally agreed that deliberate confessions of guilt are amongst the most effectual proofs in the law.' 1 Green. Ev. § 215. But that they are to be 'regarded as the highest and most satisfactory character of proof' has never been the doctrine of this court."

"Observation and experience have led the most eminent and enlightened Judges in the administration of the criminal law to the conclusion, and it has become the established doctrine and rule for the government of Courts, that the evidence of verbal confessions of guilt is to be received with great caution." *Cain v. State*, 18 Tex. 387 (1857).

"Where parties make admissions or declarations against themselves, the law presumes they are true because made against their interest; but this is only a presumption and may be rebutted. Statements, confessions and admissions, when given in evidence, must all be taken together, and the jury will attach such credit to them as they deem them worthy of. They may believe everything the party says in his favor, or they may reject the same. It all depends upon the circumstances surrounding the case, and the degree of probability there is in the truth of the statements, when viewed in the light of the whole transaction which they purport to narrate." *State v. Hollenscheit*, 61 Mo. 302 (1875).

On the other hand, circumstances may give a voluntary confession of guilt very strong probative force.

For example, in *State v. Brown*, 48 Ia. 382 (1878), "The defendant asked the court to instruct the jury as follows: 'Confessions alleged to have been made by the prisoner in the presence of the prosecutor alone, or in the presence of the prosecutor and one or more of his select friends, are the weakest of all testimony deemed competent in law, and should be received and considered as such, and confessions made in the presence of any one witness alone are deemed in law as weak and unsatisfactory, unless corroborated by other testimony.' This instruction was refused, and the court instructed the jury in these words: 'When it is shown that a public offence has been committed, free and voluntary confessions of guilt, or of facts necessarily tending to show his guilt, by the party accused, are, by the law, presumed to be true, and are entitled to the highest credit and greatest weight as evidence of such fact or facts; but such confessions will not warrant a conviction, unless they are accompanied by other evidence that the crime has been committed.'

"We think the instruction asked by defendant was properly refused. A voluntary confession of crime is not the weakest of all testimony deemed competent in law. It is true, evidence of a confession should be examined with care; but when it is clearly established, whether made in the presence of the prosecutor or his friends, or to one person alone, if made voluntarily, it should not be regarded as weak and unsatisfactory.

The instruction given by the court upon this subject, when considered in the light of the facts of the case, was correct. The evidence, without conflict, showed a free and voluntary confession of the crime, with all its particulars. In such cases the confession is entitled to the highest credit and greatest weight as evidence."

The Kentucky court of appeals has held that the court is not warranted in cautioning the jury as to the credibility of confessions. "Evidence of confessions, like evidence of other facts, is to be weighed by the jury, and the court has no more right to caution them in regard to such evidence than in regard to any other species of evidence." *Blackburn v. Com.*, 12 Bush, 181 (1876).

In *Com. v. Sanborn*, 116 Mass. 61 (1874) the course of the *nisi prius* judge was approved. "At the defendant's request the judge instructed the jury that such evidence should be received with great caution. The defendant further requested the court to instruct the jury that no substantial reliance could be placed upon this class of evidence uncorroborated. This the judge refused, but did instruct them that whether any substantial reliance could be placed upon this class of testimony depended upon the circumstances of each case, and that it was for the jury to say in this case how far they could rely upon it."

A similar view is taken in *Eiland v. State*, 52 Ala. 322, 335 (1875): "Confessions or declarations, whether offered in evidence in a civil or criminal case, must be received as a whole. The part which criminales must be taken connected with that which exculpates. The law does not ascertain the credence which shall be attached to either part, or to the confession or declaration in its entirety. The jury are not bound to attach equal credence to every part; they may, for sufficient reasons, reject a part and give effect to a part; such rejection cannot be capriciously made, nor can credence be capriciously given to a part. That which is favorable to the party should not be rejected merely because it is favorable to him, and because of the motives which may have induced him to make it. The confession should be taken as a whole; the time and circumstances of its making, — its harmony or inconsistency with other evidence, and the motives which may have operated on the party in making it, — should all be fairly considered by the jury. Then, without regard to whether they are

clearly disproved or not, the jury should credit all which they find sufficient reason for crediting, and reject all which they find sufficient reason for rejecting."

CORROBORATION REQUIRED. — It has been held, for reasons partly given above, that an uncorroborated confession is not sufficient to warrant conviction of a criminal offence. "The elementary books generally state the law to be, that confessions alone are sufficient to convict; yet it is believed no court would permit a conviction for felony upon mere confessions, made out of court, without some proof that a crime had in fact been committed, or of circumstances corroborating and fortifying the confession. The criminal law requires proof sufficient to satisfy the reason and judgment beyond a reasonable doubt of the guilt of the accused; and anything short of this will not justify a conviction. Mr. Justice Blackstone, in speaking of confessions not made upon due caution and deliberation, and to unauthorized persons, says: 'they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or repeated with due precision; and incapable in their nature of being disproved by negative evidence.' And the same author approves the rules laid down by Sir Matthew Hale: never to convict of larceny till the goods are proved to have been stolen; nor to convict of murder or manslaughter unless the body be found dead. 4 Black. Com. 357, 358 and 359. Experience has shown that confessions have sometimes turned out unfounded; that the weak, to avoid apparent impending peril, and under the force of surroundings, exciting apprehensions, and imaginary dangers, have been induced to state untruths which have produced their conviction of supposed crimes.

The humanity of the law will not tolerate a general rule which, in its operation, endangers the security of innocence, and is unsafe to life or liberty, in the administration of the law. Confessions proved are necessarily weak or strong evidence, according to the circumstances attending the making and the proving of them; and we think the only safe general rule is to require some other evidence corroborative of their truth." *Bergen v. People*, 17 Ill. 426 (1856); *Williams v. State*, 12 Lea. 211 (1883).

"An extra-judicial confession, not corroborated by independent evidence of the *corpus delicti*, would not support a conviction for felony." *Johnson v. State*, 59 Ala. 37 (1877); *State v. German*, 54 Mo. 526 (1874); *State v. Knowles*, 48 Ia. 598 (1878); *Smith v. Com.*, 21 Gratt. 809 (1871); *People v. Thrall*, 50 Cal. 415 (1875); *Pitts v. State*, 43 Miss. 472 (1871); *U. S. v. Mayfield*, 59 Fed. Rep. 118 (1893); *Ryan v. State*, 100 Ala. 94 (1893); *Dunn v. State (Tex.)*, 30 S. W. 227 (1895); *Lambright v. State*, 34 Fla. 564 (1894); *People v. Simonsen*, 107 Cal. 345 (1895). So in a libel for divorce for adultery. *Lyon v. Lyon*, 62 Barb. 138 (1861).

But only such proof of the *corpus delicti*, outside the confession, is required as the nature of the case admits. For example, in case of a homicide at sea, plenary proof of the crime is not required. *U. S. v. Williams*, 1 Cliff. 5 (1858).

Surrendering stolen property with admission of guilt will warrant a conviction. *State v. Munson*, 7 Wash. 239 (1893). A like effect follows finding property as stated in a confession. *State v. Hansen*, 25 Oreg. 391 (1894).

On the other hand, a confession of guilt given while testifying as a witness on the trial of another has been held sufficient, without corroborative evidence, to support a conviction for felony. "It would be difficult to conceive of evidence of guilt ordinarily more satisfactory to a sensible mind than a party's own statements, solemnly and freely made under oath, upon the trial of another cause, when not himself accused, and when no motive or inducement is perceptible to beget a departure from the truth, and when falsehood would be wilful and corrupt perjury." *Anderson v. State*, 26 Ind. 89 (1866).

MUST BE VOLUNTARY. — Before the evidence showing a confession can properly be received, it must affirmatively appear that the declarant's statements "have not been obtained by the influence of hope or fear, applied by a third person to the prisoner's mind." *Cain v. State*, 18 Tex. 387 (1857); *People v. Soto*, 49 Cal. 67 (1874); *State v. Anderson*, 96 Mo. 241 (1888); *Green v. State*, 88 Ga. 516 (1891); *Com. v. Flood*, 152 Mass. 529 (1890); *Searcy v. State*, 28 Tex. App. 513 (1890); *Johnson v. State*, 59 Ala. 37 (1877); *State v. Crowson*, 98 N. C. 595 (1887); *Colburn v. Groton*, 66 N. H. 151 (1889); *May v. State*, (Neb.) 56. N. W. 804 (1893); *Bubster v. State*, 33 Neb. 663 (1891).

"Confessions are inadmissible when induced by threats, or by a promise of favor, made by persons apparently acting by authority." *People v. Clarke* (Mich.), 62 N. W. 1117 (1895).

"We feel constrained by our former decisions to hold, that a confession induced by hope or fear, excited in the mind by the representations of any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, be fairly supposed by him to have power to secure him whatever of benefit is promised, or to influence the threatened injury, cannot be regarded as voluntary, and ought not to be received in evidence.

The confessions in this case were made to a person who was engaged as a clerk in the store-house alleged to have been broken and entered, and the owner of a part of the goods said to have been stolen therefrom. They were made while the prisoner was in jail, and upon promises that he (the clerk) would not prosecute him, and would not appear as a witness unless compelled. It

would be a departure from the current of our former decisions, which have not favored the admissibility of confessions, unless plainly shown to be voluntary — uninfluenced by hope or fear — to pronounce these confessions admissible evidence.” *Murphy v. State*, 63 Ala. 1 (1879). “Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession. . . . But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law. Tested by these conditions, there seems to have been no reason to exclude the confession of the accused; for the existence of any such inducements, threats or promises seems to have been negatived by the statement of the circumstances under which it was made.” *Hopt v. Utah*, 110 U. S. 574 (1884).

A curious exception to the exclusion of a confession under promise of pardon exists. A confession, made under hope of pardon, by one who turns “state evidence” is regarded as “voluntary” if the prisoner refuses to testify in accordance with his confession. “We cannot perceive how the prisoner, thus situated, could have any motive falsely to accuse himself, although he might have a motive to continue his false accusation against his accomplices. And besides, if any such motive could be supposed to operate, it was a new motive, and not arising from external influence. And it is no objection to the admission of a confession, that it was made from interested motives and with the hope of favor, if the motive is not excited by external influence.

If the accomplices had been upon trial, it is clear that the testimony of the prisoner would have been competent against them. It would be liable to great observation, and its credibility would be the fair and just subject of argument. But still it would be competent. And yet the motives which could operate upon his mind would be strong, to magnify the evidence against his accomplices, but he would have no motive to criminate or accuse himself beyond the truth.” *Com. v. Knapp*, 10 Pick. 477, 491 (1830).

An involuntary confession will still be evidence against another one of the participants in a civil action. *Newhall v. Jenkins*, 2 Gray, 564 (1854).

The rejection of a confession regarded as involuntary is not based on any feeling of fairness to the accused. A confession obtained by eavesdropping is competent. *Woolfolk v. State*, 85 Ga. 69, 99 (1890). A confession obtained under promise of secrecy is competent. *State v. Mitchell*, Phillips (N. C.) 447 (1868); *State v. Darnell*, 1 Houst. Crim. Rep. 321 (1870). So of one obtained by deception. *Com. v. Hanlon*, 3 Brews. 461, 499 (1870). Or by falsely informing the prisoner that his accomplices had been captured and had betrayed him. *State v. Jones*, 54 Mo. 478 (1874); *Price v. State*, 18 Oh. St. 418 (1868).

Or by false information that an accomplice had been shot. *King v. State*, 40 Ala. 314 (1867).

The reason for this rule is given in *Price v. State* (ubi supra). "The true rule seems to be, that in order to exclude the evidence, there must have been something said or done calculated to induce a hope of advantage, or fear of harm. The fact that he was a prisoner, and that a fraud was practiced upon him, is not sufficient. They have no tendency to make him swerve from the truth. However we may condemn the fraud, we cannot reject the voluntary confession." *Price v. State*, 18 Oh. St. 418 (1868).

It is no objection to a confession that the detective "got into the confidence" of the prisoner by false pretences. *Cornwall v. State*, 91 Ga. 277 (1892); *Stone v. State* (Ala.) 17 So. 114 (1895). Or that the accused confessed on being threatened by a fellow-citizen with a prosecution for his offence. *Bohanan v. State*, 92 Ga. 28 (1893). Or that there are firearms in the room. *State v. Watt*, 47 La. Ann. 630 (1895).

It has, on the contrary, been held in Texas that where a confession was obtained by false statements of the prosecuting witness or other fraud the confession was not voluntary. *Cook v. State*, 32 Tex. App. 27 (1893).

If a person is aware of what he is saying, the fact that advantage is taken of intoxication in procuring his confession does not affect its admissibility. *Eskridge v. State*, 25 Ala. 30 (1854); *Williams v. State*, 12 Lea, 211 (1883); *State v. Feltes*, 51 Ia. 495 (1879); *Lester v. State*, 32 Ark. 727 (1878).

The rule is the same, even where intoxicating liquor is furnished by the officer himself. *People v. Ramirez*, 56 Cal. 533 (1880); *Jefferds v. People*, 5 Parker, C. R. 522, 547, 560 (1862).

Whether the accused was too intoxicated under the circumstances to know what he was doing is a question for the jury. "The court instructed the jury that the evidence of intoxication was an objection to the weight and not to the competency of the

testimony; and that if the defendant was so much under the influence of liquor as not to understand what he was confessing, they should disregard the confessings altogether. These instructions were entirely right." *Com. v. Howe*, 9 Gray, 110 (1857).

The prisoner is at liberty to prove that he was intoxicated at the time of a confession. *Lester v. State*, 32 Ark. 727 (1878).

And while such evidence does not exclude the confession, it may affect the weight the jury may give it. *White v. State*, 32 Tex. App. 625 (1894).

And the jury in deciding whether a person was under the influence of delirium tremens or knew the effect of his statement, may be aided by experts. "Where a confession is shown, and there is evidence tending to show that the defendant, at the time of the confession, was laboring under delirium tremens, or was otherwise insane, we think that the opinion of an expert may properly be taken upon the defendant's mental condition as indicated by the proven facts. We see no reason why his insanity may not be established by any kind of evidence which is employed in any case to establish such a fact." *State v. Feltes*, 51 Ia. 495 (1879).

A rather anomalous decision was reached in an early California case to the effect that statements made during sleep were not competent as confessions. "The bill of exceptions in this case states that certain words uttered by the defendant while sleeping were given in evidence against him at the trial. It is difficult to see upon what principle this evidence was admitted, and we are of opinion that the objection to it should have been sustained. If the defendant was asleep, the inference is that he was not conscious of what he was saying, and words spoken by him in that condition constituted no evidence of guilt." *People v. Robinson*, 19 Cal. 40 (1861).

WHAT IS UNDUE INFLUENCE? — In many instances, especially where the motives acting on a prisoner's mind may be conjectured to be mixed, it is difficult to draw the line as to what persuasion to confession crosses the legal line.

Mere adjurations to tell the truth do not render a confession involuntary. *State v. Anderson*, 96 Mo. 241 (1888); *State v. Habib* (R. I.), 30 Atl. 465 (1894).

But "the words, 'you had better own up,' followed by, 'I was in the place when you took it; we have got you down fine; this is not the first you have taken; we have got other things against you nearly as good as this,' spoken by one police officer to another, in a police station, and in the presence of the superior officer of the person addressed and of the speaker, who has detected him in the act of stealing, will render a subsequent confession of guilt by the accused person inadmissible at the trial of an indictment

against him for the larceny." *Com. v. Nott*, 135 Mass. 269 (1883); *Com. v. Myers*, 160 Mass. 530 (1894). So where the prisoner was informed by a constable, while under arrest, that "the truth would go better than a lie," the confession so obtained was held inadmissible. *R. v. Romp*, 17 Ont. 567 (1889). So where a prisoner was told, "it will be better for you to make a full disclosure," the confession so obtained is not voluntary. *People v. Barrie*, 49 Cal. 342 (1875). Where the prisoner was told that "if he was guilty, it could not put him in any worse condition, and he had better tell the truth at all times," the statement did not make a confession involuntary. *Fouts v. State*, 8 Oh. St. 98 (1857).

Where a constable informed a prisoner, "you had as well tell all about it," a confession made a little later was held involuntary. *Vaughan v. Com.* 17 Gratt. 576 (1867). So where the officer said to the prisoner, "if you are guilty, I would advise you to make an honest confession; it might be easier for you. It is plain against you," a confession made later, the indictment not being shown to have been withdrawn, is not voluntary. *State v. Drake*, 113 N. C. 624 (1893).

A remark by a jailer to a female prisoner that "if the commonwealth would use any of them as a witness, he supposed it would prefer her to either of the others," does not render a confession involuntary, there being no threat or promise. *Fife v. Com.* 29 Pa. St. 429 (1857).

Where the bailiff said to his prisoner that if he would confess a larceny and tell where the stolen property was, "he should be turned loose," it was held that a confession obtained next day was not voluntary. "We cannot say that the hope thus inspired was not operating on him, when he made the confession on the next day, and during the continuance of the arrest." *Ward v. State*, 50 Ala. 120 (1876). A statement to a prisoner that if he confessed "it would go easy with him; that it would be better for him to confess; that the door of mercy was open, and that of justice closed;" together with a threat "to arrest him, and expose his family, if he did not confess," are sufficient to make a confession inadmissible. *Beery v. U. S.*, 2 Col. 186 (1873).

The mere circumstance that a declarant is under arrest at the time is not conclusive against the receipt of a confession. "The confessions of the prisoner made at the station-house in Boston after his arrest to the police officer who arrested him, were properly admitted in evidence. The confession was not induced by any promise or threat and so far as appears was entirely voluntary. (*People v. Wentz*, 37 N. Y. 309). It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or

in answer to questions put by him, or that it was made under hope or promise of a benefit of a collateral nature." *Cox v. People*, 80 N. Y. 500, 515 (1880); *Murphy v. People*, 63 N. Y. 590 (1876); *Harding v. State*, 54 Ind. 359 (1876); *State v. George*, 93 N. C. 567 (1885); *Com. v. Sego*, 125 Mass. 210 (1878); *People v. McGloin*, 91 N. Y. 241 (1883); *People v. Chapleau*, 121 N. Y. 266 (1890); *Dickerson v. State*, 48 Wis. 288 (1879); *State v. Branham*, 13 S. C. 389 (1879); *People v. Ramirez*, 56 Cal. 533 (1880); *State v. Johnson*, 47 La. Ann. 1225 (1895); *Com. v. Coy*, 157 Mass. 200 (1892); *People v. Flynn*, 96 Mich. 276 (1893).

Even if the accused is a child of the age of fourteen years. *Com. v. Smith*, 119 Mass. 305 (1876). Or the prisoner is tied. *State v. Rogers*, 112 N. C. 874 (1893). Or is in irons. *Sparf v. U. S.*, 156 U. S. 51 (1895). And expecting to die from the effects of poison. *State v. Gorham*, 67 Vt. 365 (1894). Or where the arrest is illegal, e. g., without a suitable warrant. *Balbo v. People*, 80 N. Y. 484 (1880).

But where the grand jury sent for a prisoner and examined him under oath without apprising him of his rights, it was held that a confession so obtained was not voluntary. *State v. Clifford*, 86 Ia. 550 (1892).

The fact that the officer used a revolver in effecting the arrest does not render a subsequent confession inadmissible. *State v. DeGraff*, 113 N. C. 688 (1893).

A remark by the owner of stolen goods to a clerk nineteen years of age, made after the latter had been arrested but was out on bail, "I should like you to make a clean breast of this matter," is not sufficient in itself to warrant rejecting the confession. "In this case there was no promise or threat." *Com. v. Sego*, 125 Mass. 210 (1878).

A mere undisclosed purpose on the part of an officer to make an arrest does not so far amount to an arrest as to require that the accused should be warned, in a state where such warning is required in the case of persons under arrest. *Holmes v. State*, 32 Tex. Cr. 361 (1893).

"It is also quite well settled, as a presumption of law, that the influence of threats or promises once made continue to operate until rebutted by proof clearly showing that it had ceased to operate. . . . In the case at bar, the defendant, after having been once threatened with death by hanging, by parties in disguise, and again taken from the jail by the same parties, evidently for the purpose of again repeating the threat, possibly in a more effectual manner, and without any assurance or caution, was induced to make the confession proven on the trial. Under such circumstances, though one of the witnesses testified that the confession was voluntarily made, yet without any proof why the defendant

was so taken from the jail, or what was done or said to him to induce the confession, it would be exceeding hard to convince a reasonable mind that the influence of the former threat had wholly ceased." *Barnes v. State*, 36 Tex. 356 (1872); *Beery v. U. S.*, 2 Col. 186 (1873).

Use by a sheriff of the language "there is no doubt but that you are one of the guilty parties, and if you will tell me all about it, so I can get all the guilty parties, I will do what I can for you in your case. It may be of interest to you, and to me, too," to the defendant while a prisoner, is sufficient, though accompanied by a caution that whatever was said would be used as evidence, to render a confession inadmissible. *Searcy v. State*, 28 Tex. App. 513 (1890).

A confession obtained by a sheriff when a mob is hanging over the prisoner, is not voluntary. *Taylor v. State*, 37 Neb. 788 (1893).

So of a confession obtained by a mob itself, though assuring the declarant that only an honest confession was desired. *Willams v. State*, 72 Miss. 117 (1894).

"To make a confession, therefore, evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. But the Court in such cases must judge of the motives which induce the confession, from the confession itself, and the circumstances under which it was made." *U. S. v. Nott*, 1 McLean, 499 (1839).

If the same inducements can be supposed to apply to a reiterated, as to an original, statement, the later confession is not admissible. *Beery v. U. S.*, 2 Col. 186 (1873).

But, on the contrary, "the rule, universally recognized, is that even though promises or threats have been used by persons in authority, yet if it appears to the satisfaction of the judge that their influence was totally done away before the confession was made, the evidence will be received. *Early v. Com.*, 86 Va. 921 (1890).

"It is not to be presumed that, if one officer makes threats or promises, their influence will lead the prisoner to accuse himself falsely to another officer." *Com v. Cuffee*, 108 Mass. 285 (1871); *Com. v. Myers*, 160 Mass. 530 (1894).

So where inducements, securing a confession objectionable as involuntary, were made by an officer, but the same statements a few hours later were repeated to the state's attorney after a caution that no favor need be expected, the latter confession is admissible. *State v. Carr*, 37 Vt. 191 (1864).

Where, however, the confessions are afterwards repeated to the same person who held out the inducements, it was held that a

stricter rule must be applied. "How or whence does it appear that the motives which induced the first confession, had ceased to operate when it was repeated; it is not incumbent upon the prisoner to show that they resulted from the same motives. It is presumed that they did; and evidence of the most irrefragable kind should be produced to show that they did not. It is sufficient that they may proceed from the same cause." *State v. Lowhorne*, 66 N. C. 638 (1872); *State v. Drake*, 113 N. C. 624 (1893).

The opposite result has been reached in Massachusetts, where subsequent answers, though made to the same officer, were not made under circumstances which the supreme judicial court considered "such as to afford a reasonable presumption that the defendant's answers were influenced" by the previous inducements. *Com. v. Myers*, 160 Mass. 530 (1894).

The fact that the defendant is in fear from causes other than threats by the officer does not render a confession involuntary. *Com. v. Smith*, 119 Mass. 305 (1876).

A threat or promise, in order to render a confession inadmissible, must relate to punishment for the offence itself.

Where a prisoner in solitary confinement and chained was promised by his jailor that if he confessed he should be unchained and allowed to associate with the other prisoners, a confession so obtained was said, *obiter*, to be unobjectionable. "This was the promise of a temporary and collateral boon, and not a hope or favor held out in respect to the criminal charge." *State v. Tatro*, 50 Vt. 483 (1878).

"Confessions obtained by the influence of hope or fear are incompetent evidence. But it is not necessary that the confession should be the prisoner's own spontaneous act; and if it be made under the promise of some collateral benefit or boon, no hope or fear being held out in respect to the criminal charge against him, it will be competent." *State v. Wentworth*, 37 N. H. 196 (1858).

It is hard to reconcile the case of *Anderson v. State* (Ala.), 16 So. 108 (1894) with this rule. "On trial for seduction, a witness for the state testified that, after defendant's arrest, witness told him he could not get out of the charge, and that it would be better to tell witness all about it, as he would buy defendant's crop, and assist him to leave the country, and that defendant replied, 'I have no way of proving myself clear, and am going to leave.' Held, that the confession was not voluntary." *Anderson v. State*, 16 So. (Ala.) 108 (1894).

PERSONS IN AUTHORITY — Where a friend advised a defendant, whose house was surrounded by a sheriff's posse for his arrest, that "it would be better for him" to confess and turn "state's witness," the confessions so made were held voluntary. "The general doctrine is indisputable, that confessions which are 'forced from

the mind by the flattery of hope or the torture of fear ' are considered as made under mental duress, and therefore incompetent as evidence; but whether they are so extorted must depend on the character of the authority, power, or influence by which they are induced; and it will not be presumed that a person having no control over a prisoner, or the charge against him, or authority to make good a promise or execute a threat, could without physical force, or duress at least, so far inspire either hope or fear in his mind as to induce a false confession of his guilt. While therefore it is clear that confessions induced by the promises, threats, or advice of the prosecutor or officer having the prisoner in charge, or of any one having authority over him, or the prosecution itself, or of ' a private person in the presence of one in authority,' whose acquiescence may be presumed, will not be deemed voluntary, and will be rejected, the rule is generally the reverse in relation to confessions superinduced by indifferent persons, acting officiously, without any kind of authority; and confessions made under such circumstances will be admitted in evidence." *Young v. Com.*, 8 Bush, 366 (1871). The supreme court of Alabama has carried the doctrine of "authority" to the extreme in holding that where a negro woman, suspected of infanticide, was waited on by four self-appointed neighbors to inquire the truth of the matter, and confessed the deed on their assurance that her confession would "be the last of it," such a confession was inadmissible because the declarant must have supposed that her questioners "as clothed with some authority to institute the investigation." *Gregg v. State (Ala.)* 17 So. 321 (1895).

A young man living in the jailor's family, who occasionally, in the absence of the jailor, attended on the prisoners, and kept the keys of the jail, is not a person in authority, whose threat or promise will exclude the confessions of a prisoner in the jail awaiting his trial. *Shifflet v. Com.*, 14 Gratt. 652 (1858).

A "private detective" employed to work up a case is not a person in authority. *Early v. Com.*, 86 Va. 921 (1890).

In a case of stealing from the post-office, a special "agent of the post-office department" is a person in authority as regards a confession made to him. *Beery v. U. S.*, 2 Col. 186 (1873).

A magistrate examining for committal for the criminal offence of rape is a person in authority. *Austine v. People*, 51 Ill. 236 (1869).

Where a witness for the state told the accused during an interview at the jail that if he would confess "he would get clear," prejudicial remarks by the accused, not amounting to a direct confession, are incompetent. *Johnson v. State*, 61 Ga. 305 (1878).

Where an accused was visited in his cell after midnight by several persons in succession, to threaten and cajole into a confession

of guilt, such confession was held involuntary. "None of these persons was the officer in charge; but their admission to the cell at such an unreasonable hour carried with it an implication of the officer's consent to their mission, and respondent could scarcely fail to be impressed that their assurances were made with full authority." *People v. Wolcott*, 51 Mich. 612 (1883).

In a Massachusetts case, it appeared that "the prisoner was taken and carried to New Bedford by two police officers, upon suspicion that he was guilty of the murder of Howard; that they stripped him of his clothing, and searched him, and placed him in a cell at the station-house; and that about ten o'clock at night they took him out of his cell for the purpose of questioning and examining him, and examined him from that time till midnight, without warning him of his right not to answer unless he chose to do so, or offering him an opportunity to consult with counsel or friends. The defendant's counsel objected to the admission in evidence of statements then made by the prisoner to the police officers, tending to show his guilt. But it was ruled that, in the absence of any evidence of threats or promises other than might be inferred from the above, such statements were admissible in evidence." The ruling was approved. *Com. v. Cuffee*, 108 Mass. 285 (1871).

So where the confession was made to a deputy sheriff, but one not having control of the jail, it was held that the confession was voluntary. *State v. Gossett*, 9 Rich. (S. C.) 428 (1856).

Practical experience gives much force to the language of the supreme court of Georgia in *Green v. State*, 88 Ga. 516 (1891), "We shall content ourselves, in this case, with announcing our purpose to adhere closely to the plain mandates of our own statute as expressed in §§ 3792 and 3793 of the code, and with putting the seal of our condemnation upon the practice too much indulged in by officers and quasi officers, such as detectives, in extorting or otherwise improperly obtaining confessions from prisoners in their custody. It is a gross and inexcusable abuse of authority, on the part of men occupying official positions or assuming to act officially, to thus take advantage of the helplessness or ignorance of persons charged with crime, who are to a greater or less extent under their control or in their power, and we deem it our duty to thus rebuke such conduct in unmistakable terms."

REJECTED AS UNRELIABLE. — The rules regulating the rejection of confessions not deemed voluntary are analogous to those regulating the receipt of admissions made as an offer of compromise. The confession deemed involuntary indeed, to some extent, is an attempt on the part of the accused to compromise his offence with those connected with the proceedings, exerting moral or physical restraint upon his freedom of action.

"In civil cases, what is confessed by way of compromise, or to

buy peace, is never allowed to be taken advantage of, and made evidence, inasmuch as the admission may have been made, not from a consciousness of the validity or justice of the claim set up, but from a desire to avoid litigation. The rule is not essentially different in criminal cases. In such cases, a confession, as we have before said, can never be received in evidence, when the defendant has been influenced by any threat or promise. The promise in this case was, that the prosecution should be dropped, and it was dropped, on signing the paper. Under the circumstances then surrounding him, the defendant was willing to make any sort of admission, not supposing it would be used against him before a grand jury, or elsewhere." *Austine v. People*, 51 Ill. 236 (1869).

Such a confession, therefore, is rejected because the circumstances under which it is made prevent the statement having a sufficient probative effect.

A forced confession is considered made, not because of a belief in its truth, but to secure relief from a present difficulty. "The law excluding confessions is based in a spirit of charity for the weakness of human nature, and rests upon the theory, that a man when charged with crime and threatened with the punishment of the law, or promised immunity therefrom, may be induced, while in an alarmed and excited condition of mind, to make statements that are not true." *State v. Carrick*, 16 Nev. 120, 129 (1881); *Garrard v. State*, 50 Miss. 147 (1874); *People v. Wolcott*, 51 Mich. 612 (1883); *Beckham v. State*, 100 Ala. 15 (1893).

"When the competency of a confession is drawn in question, the correct inquiry in every such case is, whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit." *State v. Harrison*, 115 N. C. 706 (1894).

"No reliance can be placed upon admissions of guilt so obtained; for the very obvious reason that they are not made because they are true, but because, whether true or false, the accused is led to believe it is for his interest to make them." *People v. Wolcott*, 51 Mich. 612 (1883). "In deciding this point the chief question is, whether the inducement held out was calculated to make the confession an untrue one. If not, it will be admissible." *Fife v. Com.* 29 Pa. St. 429 (1857). "In determining this question, it is proper to take into view the reason on which confessions so drawn out are excluded. It is not because of any breach of good faith in admitting them, nor because they are extorted illegally, (though there may be cases in which this would exclude them, as where a magistrate puts the accused upon his oath,) but the reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced, by the hope of advantage

or fear of injury, to state things which are not true." *Com. v. Knapp*, 9 Pick. 496, 503 (1830).

"Hence we have the judgment of English jurists against the admissibility of a confession obtained by temporal inducement, held out in the shape of threat, promise or hope of favor, touching one's escape from the charge against him, by a person in authority, or where such person appeared to sanction such threat or inducement, and a master or mistress, or prosecutor, is placed, in this respect, in the category of one in authority. The foundation of all rules, and of the ruling in each individual case upon this subject, rests upon an anxiety to exclude confessions that are probably not true; and, therefore, to exclude those that are not voluntary, because such are probably untrue." *State v. Vaigneur*, 5 Rich. 391, 400 (1852).

The same reasoning, that a confession is not admissible where obtained by the threat or promise of one in authority because presumably not true, applies to exclude confessions obtained by other forms of duress. *State v. Carrick*, 16 Nev. 120 (1881). For example, to a case where the declarant had been captured by armed men and interviewed by the prosecutor in presence of the officer. *State v. Drake*, 82 N. C. 592 (1880).

Or where a slave prepared for a whipping was offered by his master a lighter punishment if he confessed. *Joe v. State*, 38 Ala. 422 (1863).

Or where the declarant was apprehensive of mob violence unless a confession is made. *Seef v. State*, 6 Baxter, 244 (1873).

But where an accused was surrounded by a large number of men who suggested hanging him, the court left to the jury to decide "whether the inducement was calculated to make the testimony untrue." *Cady v. State*, 44 Miss. 332 (1870); *Butler v. Com.*, 2 Duval, 435 (1866).

INDEPENDENT FACTS — Further following the analogy of admissions in view of compromise, it has been held that where independent facts are admitted in course of an involuntary confession, the facts themselves are competent. *U. S. v. Nott*, 1 McLean, 499 (1839); *State v. Garrett*, 71 N. C. 85 (1874); *Lowe v. State*, 88 Ala. 8 (1889); *Yates v. State*, 47 Ark. 172 (1886); *Clemons v. State*, 4 Lea, 23 (1879); *Duffy v. People*, 26 N. Y. 588 (1863); *Belote v. State*, 36 Miss. 96 (1858); *Massey v. State*, 10 Tex. App. 645 (1881); *R. v. Doyle*, 12 Ont. Rep. 347 (1886); *Taylor v. State*, 37 Neb. 788 (1893); *Gregg v. State* (Ala.), 17 So. 321 (1895).

"The general rule is that, after threats or inducements held out to a defendant, as in this case, 'it would be better for him to tell, if he knew, where other articles were,' any admission made by him after that, would be incompetent. But there are exceptions to this rule, and it seems to us that this case comes within the exception.

This rule is not intended for the benefit of guilty defendants, but in the interest of truth. And it has been wisely held that simple declarations and admissions, made under such inducements, are so unreliable that the law will exclude them from the consideration of the jury. But it seems also to be well settled, that any facts ascertained in consequence of such declarations or confessions, are admissible in evidence. And the declarations, connected with and explaining such facts, being considered a part of the *res gestae*, are also admissible." *State v. Winston*, 116 N. C. 990 (1895).

Thus where stolen goods were discovered in the possession of a particular person in consequence of an involuntary confession, it was held that the prisoner's statement and the corroborating discovery were competent facts; but that this did not render competent his confession, at the same time, that he had committed the burglary and larceny if such confession was improperly procured by promises or threats. "It is not the entire confession, however, which may be received; it is only so much of it as relates strictly to the material fact discovered, that may be given in evidence; for the fact discovered has a reasonable tendency to confirm that part of the confession, and to exclude the idea of its fabrication under undue influences. . . . Applying this rule to the evidence in this cause, it was proper to leave to the consideration of the jury the fact that, in consequence of the statement made by the prisoner, a part of the stolen goods were found in the possession of a particular person, recently after the burglary; but not his acknowledgment that he had broken and entered the store, or that he had stolen the goods. These are facts the jury must collect or not from all the circumstances of the case, and they are not to be aided by confessions extorted from the excited hopes of the prisoner." *Murphy v. State*, 63 Ala. 1 (1879); *State v. Garvey*, 28 La. Ann. 925 (1876); *Garrard v. State*, 50 Miss. 147 (1874).

"A modification of the rule, which excludes a confession not shown to be voluntary, is, that if information, derived therefrom, leads to the discovery of material facts, which go to prove the commission of the crime, so much of the confession as strictly relates to the facts discovered, and the facts themselves, will be received in testimony, though the confession may not be shown to have been voluntary; for the reason, that the discovery of the facts corroborates the truth of the confession; to that extent. . . . There is evidence showing that the body of the deceased was found at the place where accused stated it was left, partially covered with leaves, as were also a broken-handled knife, watch-chain, keys, and a brown soft hat, near the body." *Lowe v. State*, 88 Ala. 8 (1889).

"It is, therefore, well settled upon reason, principle and authority, that it is competent to show that the witness was directed by the accused where to find the goods, and that they were found there accordingly." *Garrard v. State*, 50 Miss. 147 (1874).

So where a confessing prisoner produced and identified a portion of the stolen gold dust at the time of his confession, the latter fact is competent. *Beery v. U. S.*, 2 Col. 186 (1873).

And where a prisoner is illegally induced to confess the larceny of certain lumber, his act in producing and identifying the lumber is competent. *U. S. v. Richard*, 2 Cranch C. Ct. 439 (1823). An offer to compromise a larceny is evidence of an admission. *State v. Rodrigues*, 45 La. Ann. 1040 (1893).

The witness, after being asked whether he had a conversation with the prisoner, and objection being made that the confession is involuntary, may then be further asked what he "did in consequence of what he said about it?" *Duffy v. People*, 26 N. Y. 588 (1863); *Com. v. James*, 99 Mass. 438 (1868).

Where the prisoner, as promised in an incompetent confession, pointed out a place where the stolen money was found, that fact is competent; but the statement during the confession, "I buried the money there," is incompetent. *People v. Hoy Yen*, 34 Cal. 176 (1867). "The independent fact that the money was found was certainly admissible in evidence, and there can be no doubt that it has been a rule of law long and well established that not only such a fact, but acts and declarations of the accused, in so far as they explain and are necessary to account for it, whether the acts or declarations be voluntary or involuntary, may be received for this purpose. . . . Such evidence when admitted for this sole purpose is not treated as proving a confession, but as being a part of the *res gestae* of the independent evidentiary fact. If what the accused did and said was the result of coercion, however mild, it would have been inadmissible had not the search which was made for the money resulted in its discovery. The discovery being a material and relevant fact, what would contribute to account for and explain it would be relevant also, not for its own sake, but for its explanatory function and value. It may be that the whole of the evidence would be inadmissible according to the true meaning and spirit of the rule, if it appeared that criminal violence, such as whipping, was used in coercing the act or extorting the speech which led to the discovery. The fruits of physical torture as distinguished from those of mere fear, it would seem, ought to be unavailing." *Rusher v. State*, 94 Ga. 363 (1894).

The effect upon the prisoner's position of refusing to admit his confession of guilt and yet receiving as competent facts gleaned through the incompetent confession, which, of course, serve to give confirmation and credibility to that which has been excluded as not probative because probably untrue, is thus discussed by the supreme court of Arkansas. "The exception that exists to the general rule that confessions in cases of larceny made under threats are not evidence, is shown by the authorities to be this:

When statements are made by the accused that lead to the discovery of the stolen property, then the rule is that it is admissible to show that the property had been traced by means of information received from the accused; and all that was said by the accused in conveying the information, which is directly connected with or explanatory of the discovery, is also admissible. The statement as to his knowledge where the stolen property was to be found, being thus confirmed by the fact of finding, is proved to be true and not to be fabricated in consequence of the improper means employed to obtain the confession. But the rule as to the direct confession of guilt remains intact, and the discovery of the property through information derived from the accused does not justify the introduction of the confession that it had been stolen by him. That must be excluded notwithstanding the facts otherwise proven to be true, leaving the prisoner to reconcile, as best he can, his knowledge of these facts with his innocence of the crime." *Yates v. State*, 47 Ark. 172 (1886).

Whether the involuntary confession itself, when verified by ascertaining the independent facts, becomes competent as now presumably true is queried in *Belote v. State*, 36 Miss. 96 (1858).

In Texas it has been held that an otherwise admissible confession becomes competent if, in consequence of what is said, the clothing of the deceased is found. *Spearman v. State* (Tex.), 30 S. W. 229 (1895). Or where, under a statute, stolen property is found in consequence of such confession. *Sands v. State*, 30 Tex. App. 578 (1891).

In West Virginia, it has been held that an involuntary confession becomes itself competent "where the confession is accompanied with the surrender and restoration of the stolen property." *Fredrick v. State*, 3 W. Va. 695 (1869).

In Pennsylvania, it has been ruled that "An admission by a prisoner not competent as a confession is admissible when its truth is proved by the revelation of the fact by search." *Laros v. Com.*, 84 Pa. St. 200 (1877).

On the contrary, it has been held in Louisiana, that "the discovery through a confession of facts, legally admissible in evidence, and tending to prove a defendant guilty of the charge against him, would not render admissible the confession itself, if it was not voluntary and free from compulsion or inducement." *State v. Jones*, 46 La. Ann. 1395 (1894).

A QUESTION FOR THE COURT. — Whether a confession is voluntary is a preliminary question to be decided by the court. "The evidence to this point, being in its nature preliminary, is addressed to the Judge, who admits the proof of the confession to the jury, or rejects it, as he may or may not find it to have been drawn from the prisoner by the application of those motives." *Cain v. State*,

18 Tex. 387 (1857); *State v. Vann*, 82 N. C. 631 (1880); *State v. Crowson*, 98 N. C. 595 (1887); *State v. Vaigneur*, 5 Rich. 391 (1852); *State v. Howard*, 35 S. C. 197 (1891); *Com. v. Johnson*, 162 Pa. St. 63 (1894); *Goodwin v. State* (Ala.), 15 So. Rep. 571 (1894); *Brady v. U. S.*, 1 App. D. C. 246 (1893); *Shephard v. State*, 88 Wis. 185 (1894); *State v. Gorham*, 67 Vt. 365 (1894).

That this finding cannot be reviewed in an appellate court, see *State v. Vann*, 82 N. C. 631 (1880).

"These cases establish the doctrine also that while a ruling which undertakes to define the influence that excludes the confession, and does so erroneously, is the subject of an appellate revision, its exercise in bringing about the confession in a particular instance being a fact, is not subject to the corrective power of this Court." *State v. Crowson*, 98 N. C. 595 (1887).

On the contrary, the supreme court of Pennsylvania holds that the finding of the trial judge may be reviewed, but "their ruling will be set aside only for manifest error." *Com. v. Johnson*, 162 Pa. St. 63 (1894).

Or as said in the court of appeals of the District of Columbia this "is necessarily a matter almost entirely within his discretion, the exercise of which should not be revised except in case of palpable abuse." *Brady v. U. S.* 1 App. D. C. 246 (1893). To the same effect, see *Bartley v. People* (Ill.), 40 N. E. 831 (1895).

"Whether it was made voluntarily, is a question for the consideration and determination of the court, and is usually shown by negative answers to such questions, as whether the prisoner had been told it would be better for him to confess, or worse for him if he did not; or whether similar language had been addressed to him. The better test is a fair and just consideration of the age, condition, situation and character of the prisoner, and all the circumstances attending the confession. These may satisfy the mind, although the usual preliminary questions are answered in the negative; that the confession was not voluntary, but sprang from the flattery of hope, or the torture of fear unduly excited. Or, though these questions may not be answered negatively, the circumstances attending the confession, connected with the character of the prisoner, may clearly indicate that it was spontaneous, and not affected by hope or fear springing from the words or conduct of others." *Johnson v. State*, 59 Ala. 37 (1877). "But the principle is well settled that where the admissibility of evidence depends upon a preliminary question of fact, to be tried by the court, its decision is not to be reversed unless in a case of clear and manifest error. The court that sees and hears the witnesses, must be presumed to have better means of judging, on a question of fact, than the appellate tribunal, where the witnesses are neither seen nor heard, and where it often happens that their testimony is very imper-

fectly reported." *Fife v. Com.*, 29 Pa. St. 429 (1857). See also *May v. State*, 38 Neb. 211 (1893).

It has been held to be error to leave to the jury the question whether a confession is voluntary. *State v. Duncan*, 64 Mo. 262 (1876).

On the contrary, it has been decided that "whether there was any inducement held out by the magistrate to make the confession, was a fact within the province of the jury to decide." *Garrard v. State*, 50 Miss. 147 (1874); *People v. Cassidy*, 133 N. Y. 612 (1892).

In *Com. v. Smith*, 119 Mass. 305 (1876) the question of threats or promises was apparently left to the jury. In Texas, it has been held that an involuntary confession may be used to impeach the credibility of the accused as a witness. *Rains v. State (Tex.)*, 26 S. W. 398 (1894).

It is open to the defendant to show, if he can, in opposition to the receipt of the confession in evidence, that it was not voluntary. *People v. Soto*, 49 Cal. 67 (1874); *Com. v. Culver*, 126 Mass. 464 (1879); *State v. Anderson*, 96 Mo. 241 (1888). "In this state the burden of proving that a confession was involuntary, and therefore not competent evidence against him, rests upon the accused." *Rufer v. The State*, 25 Ohio St. 464 (1874).

"Where the law imposes upon a party the burden of establishing a fact, and upon a tribunal the duty of determining its existence, it would seem to follow, necessarily, that the former should be permitted to produce within reasonable limits, and the latter required to hear and consider, any evidence that in its nature is pertinent to the inquiry. To throw upon a party the burden of proving a fact, and at the same time deny to him the right to adduce the necessary evidence, although at hand and tendered for that purpose, is an anomaly only justifiable by peculiar circumstances or conditions which do not seem to obtain in inquiries like that under consideration." *Lefevre v. State*, 50 Oh. St. 584 (1893).

It is error to refuse to allow the defendant to introduce evidence, on the preliminary hearing by the court, that the confession was procured by threats and intimidation. *Palmer v. State*, 136 Ind. 393 (1893).

The defendant may cross-examine the witnesses testifying to the voluntary nature of the confession. *Willis v. State*, 43 Neb. 102 (1894). "It is the privilege of defendant's counsel and the better practice." *Ibid.*

"When such a confession is offered in a criminal case, it is incumbent upon the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made." *People v. Soto*, 49 Cal. 67 (1874); *State v. Garvey*, 28 La. Ann. 925 (1876); *Bradford v. State (Ala.)*, 16 So. 107 (1894).

But where no objection is made to the receipt of the evidence, it is not essential that a preliminary investigation be had. *State v. Madison*, 47 La. Ann. 30 (1895).

In Georgia, it is said that while the better practice is to show that the confession is voluntary before it is received, yet this proof may be supplied, when omitted, after the receipt of the evidence. *Smith v. State*, 88 Ga. 627 (1891).

The court should, it is said, exclude the confession if there is a reasonable doubt as to its being voluntary. *Williams v. State*, 72 Miss. 117 (1894).

To the contrary, that all confessions are *prima facie* voluntary, and that it is for the defendant to sustain his objection by proving the fact of undue influence, see *Com. v. Culver*, 126 Mass. 464 (1879). "Prima facie, all confessions are voluntary, and it is for the party objecting to their admission as evidence to show that they were uttered under such pressure of hope or fear as to raise a doubt of their accuracy. It is undoubtedly the duty of the court to guard carefully the rights of a defendant in this respect; and more especially so when the prisoner is in the custody of the law and the hopes or fears are supposed to be raised by an officer of the law. The fact that a defendant may think it will be better for him if he confesses, or thinks it will be worse for him if he does not confess, is immaterial, if that condition of mind is brought about by his own independent reasoning. It is when that state of mind is induced by promises or threats or other inducement from without, that the confession is to be rejected." *Com. v. Sego*, 125 Mass. 210 (1878).

The rule is the same in Ohio. *Lefevre v. State*, 50 Oh. St. 584 (1893).

MAY STILL CONTEST BEFORE THE JURY.— Even after a confession is admitted by the court, as *prima facie* voluntary, it is still open to the prisoner to contend that it was not so in point of fact, and call upon the jury to disregard it for that reason. "Before evidence of a confession can be admitted, it devolves on the prosecution to satisfy the Court that it was voluntarily made by the prisoner. But if after it has been admitted, it appears that it was not so made, it is the duty of the Court to withdraw the evidence from the jury, and of the jury wholly to disregard it. Where it has been received, and has gone to the jury, it is the undoubted right of the prisoner to show, if he can, that it was not, in fact, voluntary, and therefore is not to have weight against him; and any evidence which conduces in any degree to that conclusion is admissible." *Cain v. State*, 18 Tex. 387 (1857). "The prisoner has always the right to require of the judge a decision of the competency of the evidence; and, even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to

give no weight to it, because of the circumstances under which the confessions were obtained." *Com. v. Culver*, 126 Mass. 464 (1879); *Miller v. State*, 94 Ga. 1 (1894); *Williams v. State*, 72 Miss. 117 (1894). And the court may leave the jury to discredit the confession if their opinion of its being voluntary differs from that of the presiding justice. *Com. v. Russell*, 156 Mass. 196 (1892); *Willis v. State*, 93 Ga. 208 (1893). This held a proper course where the evidence is conflicting. *Com. v. Burrough*, 162 Mass. 513 (1895); *People v. Mackinder*, 80 Hun, 40 (1894). The jury may pick out such portions of the confession as they may credit, rejecting the rest. *State v. Dooley*, (Ia.) 57 N. W. 414 (1894); *State v. Johnson*, 47 La. Ann. 1225 (1895).

ARE REBUTTABLE. — Like other admissions, confessions, if believed, are a *levamen probationis* and may be controlled by evidence. For instance, the prisoner may show, if he can, that his words, though reduced to writing, have been misunderstood. *State v. Brown*, 1 Mo. App. 86 (1876).

PART IV.

EVIDENCE SUBJECT TO SPECIAL RULES OF LAW.

CHAPTER I.

EVIDENCE EXCLUDED ON GROUNDS OF PUBLIC POLICY.

§ 908.¹ THE law *excludes* or dispenses with some kinds of evidence *on grounds of public policy*: because it is thought that greater mischiefs would probably result from requiring or permitting their admission, than from wholly rejecting them. Our attention must now be directed to it so far as it applies to the matter concerning which the witness is interrogated.

§ 909. The rule has reference to either (a) persons,² or (b) matters. The *matters* which the law says shall not be the subject of evidence in a Court of Justice are: (1) Communications which have passed between husband and wife during marriage; (2) disclosures by such adviser of communications which have been made by a man to his legal adviser; (3) evidence by judges or jurymen as to matters which have taken place while they were engaged *judicially*; (4) State secrets; and (5) matters of which decency forbids the disclosure.

§ 909A. The *first class* of subjects protected from disclosure consists of *communications between husband and wife*. ' "No husband," says the Legislature, "shall be *compellable*³ to disclose any communi-

¹ Gr. Ev. § 236, in part.

² So far as the rule relates to the *persons* testifying, it will be hereafter discussed in the chapter relating to the competency of witnesses, post, Part v. Ch. ii.

³ In America it has been decided that, so far as such statute is concerned, a *voluntary* statement is admissible. See *Southwick v. Southwick*, 1870 (Am.). But see *infra*, as to whether at common law one of the

cation made to him by his wife during the marriage, and no wife shall be *compellable*¹ to disclose any communication made to her by her husband during the marriage.”² This enactment rests on the obvious ground, that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all* communications of whatever nature which pass between husband and wife.³ It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated “during the marriage.” Consequently, if a man were to make the most confidential statement to a woman *before* he married her, and she were subsequently called as a witness in a civil suit, and interrogated with respect to the communication, she would, it seems, be bound to disclose what she knew of the matter.

§ 910. It has not been settled in England to what communications made during marriage the privilege extends. In America it has been held only to extend to matters or knowledge of what was only obtained by reason of the conjugal relation;⁴ to extend to all that passes between husband and wife when alone, or when only children of tender years are present; to also extend to conversations between husband and wife which have been *overheard* by a third person,⁵ but not to extend to information which has come to either of the parties quite independently of the marriage relationship.⁴ A married person is always, both in England and in America, a competent witness to prove acts alleged by him or her to have been done by the other party to the marriage in violation of the complainant’s person or liberty.⁴

parties can, without his or her consent, testify against the other as to communications which passed between them during the marriage.

¹ See last note.

² 16 & 17 V. c. 83, § 3.

³ See *O’Connor v. Marjoribanks*,

1842.

⁴ See *Commonwealth v. Sapp*, 1890 (Am.), where the whole subject is considered.

⁵ *Com. v. Griffin*, 1872; *State v. Center* (Am.), 1862, cited *Greenleaf on Ev.* 15th edit. (1892), note to § 254.

C. I.] COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

§ 910A. A question may arise as to whether or not the relation of husband and wife must be *still subsisting* at the time when the evidence is required. On the one hand, the statute speaks only of husbands and wives, and makes no reference either to widowers or widows, or to parties who have been divorced; but on the other hand, the old common law rule, which precluded husbands and wives from giving evidence for or against each other, has been construed by the judges to mean, that whatever had come to the knowledge of either party by means of the hallowed confidence which marriage inspires, could not be afterwards divulged in testimony, even though the other party were no longer living.¹ Accordingly, when a woman, divorced by Act of Parliament, and married to another person, was offered as a witness against her former husband, she was held clearly incompetent, the judge adding, "It never can be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."²

§ 911.³ Secondly, as regards *professional communications*, the rule is now well settled, that, where a *barrister* or *solicitor* is professionally employed by a client, all communications between them, in the course and for the purpose of that employment, are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them, whether they be in the form of title deeds, wills,⁴ documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity,⁵ and this even though third persons were

¹ O'Connor v. Marjoribanks, 1842; overruling Beveridge v. Minter, 1824, and confirming Monro v. Twistleton, 1802. See, also, Doker v. Hasler, 1824 (Best, C.J.).

² Monro v. Twistleton, 1802 (Ld. Alvanley); explained and confirmed (Ld. Ellenborough) in Aveson v. Ld. Kinnaird, 1805; Commonwealth v. Sapp, 1890 (Am.), ubi supra.

³ Gr. Ev. § 237, slightly.

⁴ Doe v. James, 1837. There, a party claiming as devisee under a will, his solicitor was upheld in refusing to produce a will which had

come into his hands in a professional capacity, though it was suggested that it related also to personalty, and ought, therefore, to be deposited in the Eccles. Court, and to be open for public inspection.

⁵ Herring v. Cloberry, 1842; Cro-mack v. Heathcote, 1820; Greenough v. Gaskell, 1833, where Brougham, C., was assisted by Ld. Lyndhurst, Tindal, C.J., and Parke, J. See Moore v. Terrell, 1833. Ld. Abinger also mentions the case as reviewing all the authorities. See Turquand v.

present at them.¹ Of course, cases laid before counsel on behalf of a client, and their opinions thereon, stand upon precisely the same footing as other professional communications from client to either counsel or solicitor, or from either counsel and solicitor to client.²

§ 912. This rule equally applies, though the solicitor be employed in the character, either of a scrivener to raise money,³ or of a *conveyancer* to draw deeds of conveyance;⁴ or though the conversation relate only to the sale of an estate, and to the amount of the bidding to be reserved.⁵ In fact it extends to all communications between a solicitor and his client, relating to matters within the ordinary scope of a solicitor's duty.⁶ And the legal adviser can be asked whether the conference between him and his client was for a lawful or an unlawful purpose.⁷ If either from his admission or from independent evidence it clearly appears that the communication was made by the client for a criminal purpose,—as, for instance, if the solicitor was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence,—he is bound to disclose such guilty project.⁸ The existence of an illegal purpose, it is now clearly settled, prevents the privilege from attaching; for it is as little the duty of a solicitor to advise his client how to evade the law, as it is to contrive a positive fraud.⁹ The mere name of the client, moreover, is not the subject of privilege.¹⁰

§ 913. Where the *professional adviser is the party interrogated*, it is quite immaterial whether the communication relate to any

Knight, 1836. See, also, *Chant v. Brown*, 1851-2.

¹ *Blount v. Kimpton*, 1892 (Am.). But the third party may give evidence as to them: *Hurlbert v. Hurlbert*, 1891 (Am.).

² *Pearse v. Pearse*, 1846 (K.-Bruce, V.-C.); *Jenkins v. Bushby*, 1866. See *Bargaddie Coal Co. v. Wark*, 1859, H. L.

³ *Turquand v. Knight*, 1836 (Ld. Abinger); *Harvey v. Clayton*, 1675; *Anon.*, 1693 (Ld. Holt). But here it is necessary that the solicitor should have been consulted as the party's own legal adviser: *R. v. Farley*, 1846. See post, § 923, ad fin.

⁴ *Cromack v. Heathcote*, 1820.

⁵ *Carpmael v. Powis*, 1845-6.

⁶ *Id.* (Ld. Lyndhurst).

⁷ *Reg. v. Cox and Railton*, 1884, C. C. R.; overruling *Doe v. Harris*, 1833; *R. v. Farley*, 1850.

⁸ *R. v. Cox and Railton*, supra; *R. v. Avery*, 1838; *Follett v. Jefferyes*, 1850, cited post, note to § 930; *Mornington v. Mornington*, 1861; *Charlton v. Coombes*, 1863 (Stuart, V.-C.); *Annesley v. Ld. Anglesea*, 1743 (Ir.); and post, § 936. See, also, *Gartside v. Outram*, 1856 (Wood, V.-C.); and post, § 929.

⁹ *Reg. v. Cox and Railton*, supra; *Russell v. Jackson*, 1851 (Turner, V.-C.). See, also, *Kelly v. Jackson*, 1849 (Ir.).

¹⁰ *Bursill v. Tanner*, 1885; *Ex parte Campbell*, *In re Cathcart*, 1870.

litigation commenced or anticipated.¹ As Brougham, L. C., observed, "If² the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. * * * If, touching matters that come within the ordinary scope of professional employment, legal advisers receive a communication in their professional capacity, either from a client, or on his account and for his benefit in the transaction of his business,—or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client,—they are not only justified in withholding such matters, but *bound to withhold* them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness."³

§ 914.⁴ "The *foundation* of this rule," his lordship also explains, "is not on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings."⁵ The same learned judge remarked in another case, that if such communications were not protected, no man would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights; and no man could safely come into a court, either to obtain redress, or to defend himself.⁶

¹ *Ld. Walsingham v. Goodricke*, 1843; *Desborough v. Rawlins*, 1838; *Pearse v. Pearse*, 1846 (Knight-Bruce, V.-C.); *Sawyer v. Birchmore*, 1835; *Herring v. Cloberry*, 1842; *Jones v. Pugh*, 1842; *Greenhough v. Gaskell*, 1833; *Carpmael v. Powis*, 1845-6 (*Ld. Langdale*). These cases overrule *Williams v. Mudie*, 1824; *Clark v. Clark*, 1830; *Broad v. Pitt*,

1828; and *Wadsworth v. Hamshaw*, 1819.

² Gr. Ev. §§ 240 and 237.

³ *Greenough v. Gaskell*, 1833.

⁴ Gr. Ev. § 238, verbatim.

⁵ *Greenough v. Gaskell*, 1833; quoted with approbation in *Russell v. Jackson*, 1851 (*Turner, V.-C.*).

⁶ *Bolton v. Corp. of Liverpool*, 1833. "This rule seems to be corre-

§ 915. The rigid enforcement of the rule no doubt occasionally operates to the exclusion of truth; but if any law-reformer feels inclined to condemn it on this ground, he may be reminded of the language of the late Knight Bruce, L. J., who observed:—"Truth, like all other good things, may be loved unwisely,—may be pursued too keenly,—may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."¹

§ 916. Such being the reasons for which communications to legal advisers are privileged, the privilege—though perhaps the policy of such restriction is questionable²—does not extend to matters communicated to *other* persons, though made under terms of the closest secrecy.³ Thus,⁴ medical men⁵ and clergymen⁶ are bound

lative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte Aitken*, 1820, that rule is laid down thus:—"Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, then the court will exercise this jurisdiction." See, also, *Ex parte Yeatman*, 1835. So where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure." *Turquand v. Knight*, 1836 (Alderson, B.). The Roman law was similar to ours, though the reasons were different. 1 *Mas. de Prob.*, Concl. 66; vol. 3. Concl. 1239; *Farin. Op.* Tom. 2, Tit. 6, Quæst. 63, Illat. 5, 6.

¹ *Pearse v. Pearse*, 1846.

² In *Wilson v. Rastall*, 1792, *Buller, J.*, much regretted that

privilege was not extended to cases in which medical persons acquired information by attending in their professional characters. In *Greenough v. Gaskell*, 1833, *Ld. Brougham*, while stating that the rule was limited to legal advisers, observed, that "certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers." In many of the American States statutes have been passed by which communications to medical men and to ministers of religion are made privileged, or may not be disclosed. As to these, and for the principal decisions upon them, see *Greenleaf on Evidence*, 15th edit. (1892), note to § 248.

³ See *Jessel, M. R.*, in *Wheeler v. Le Marchant*, 1881.

⁴ *Gr. Ev.* § 248, in part.

⁵ *Duch. of Kingston's case*, 1776, *H.L.*; *R. v. Gibbons*, 1823; *Broad v. Pitt*, 1828 (*Best, C. J.*).

⁶ *R. v. Gilham*, 1828. In considering this case and other common law decisions upon the subject of evidence it must be recollected that the common law knew of no distinction between *competent* and *com-*

to disclose any information which, by acting in their professional character, they have confidentially acquired; and clerks,¹ bankers,² stewards,³ confidential friends,⁴ pursuivants of the Herald's College,⁵ and, perhaps, even licensed conveyancers,⁶ are equally obliged to reveal what has been imparted to them in confidence, except as to matters which the principal himself would not be compelled to disclose, such as his title-deeds and private papers, in a case in which he is not a party.

pellable—such a distinction being entirely the creation of modern statute law. When, therefore, the judges decided (as in 1828, after argument, they all unanimously did in *R. v. Gilham*, absentee Hullock, B.) that a clergyman was *competent* to give evidence of a confession made to him, they in effect also decided that he was *compellable* to do so. It has been argued with much ability in *Best on Evidence*, 8th edit. 1893, §§ 854, 855; *Phillimore's Ecclesiastical Law*, edit. 1873, pp. 701 et seq.; and in *The Privilege of Religious Confessions in English Courts of Justice*, by Edward Badeley, M.A. —a convert from Protestantism to the Roman Catholic Church—which was published in London, by Butterworth's, in 1865, that confessions to clergymen of the Established Church are privileged, on the ground that the *articuli cleri* (9 Ed. 2, c. 10), although for centuries treated as obsolete, and at last actually repealed by "The Statute Law Revision Act, 1863" (26 & 27 V. c. 125), were long the law of the land, and that the opinion (given after the Reformation) expressed in Sir Edward Coke's comment on this statute (2 Inst. 629) may be so read as to imply that such privilege extended to everything but high treason. This view, however, cannot be accepted as being at present the law in the teeth of the decision in *R. v. Gilham*; of the dicta of the eminent judges mentioned in note ⁵ to § 917, in which they tacitly or expressly accept the position that strict law does not admit the privilege, although they protest that they individually will never enforce the strict letter of the law; and of the weight of opinion amongst the writers

of text books on the law of evidence. The present Editor has, under these circumstances, advised magistrates that, as they are bound by their oaths to dispense justice to all who seek it of them, without fear, favour, or affection, and as they are also bound to accept without question the law as laid down by the superior courts, they have no alternative but to enforce an answer from a clergyman on a matter relevant to the case before them, and ought not to excuse him on the ground that it is privileged by having been made in confession, and this although they can only punish a witness who refuses to answer by committing him for contempt, and not by merely imposing a fine: *The Queen v. Flavell*, 1884. The same considerations ought to govern the actions of other inferior courts. It will be noticed that all that the late Sir R. Phillimore ventured to commit himself to was an expression of opinion (*Phill. Ecc. Law*, 704) that it is "at least not improbable" that the privilege of clergymen of the Church of England as to matters told them in confession will be recognized when the question next comes before a superior court.

¹ *Lee v. Birrell*, 1813; *Webb v. Smith*, 1824.

² *Loyd v. Freshfield*, 1826 (*Abbott, C.J.*).

³ *Vaillant v. Dodemead*, 1792 (*Buller, J.*); *Ld. Falmouth v. Moss*, 1822.

⁴ *Wilson v. Rastall*, 1792, as reported 4 T. R. 758 (*Ld. Kenyon*); *Hoffman v. Smith*, 1803 (*Am.*).

⁵ *Slade v. Tucker*, 1880 (*Jessel, M.R.*).

⁶ See (*Parke, B.*) in *Turquand v. Knight*, 1836.

§ 917.¹ The propriety of extending privilege to communications to clergymen admitting *criminal* conduct, has been strongly urged, on the ground that evil-doers should be enabled with safety to disburthen their guilty consciences, and by spiritual instruction and discipline to seek pardon and relief.² The Roman Church adopts this principle in its fullest extent, not only,—as already intimated,³—by excepting such confessions from the general rules of evidence, but by punishing the priest who reveals them, and even allows a priest, who has heard a confession as such, when appearing as a witness in his private character, to swear that he knows nothing of the subject.⁴ In Scotland, the confession of a prisoner in custody while preparing for his trial, in order to obtain spiritual advice and comfort, is privileged; but communications made confidentially to clergymen in the ordinary course of their duty, are not.⁵ By the common law of England,⁶ no distinction is recognised between clergymen and laymen, and all confessions and other matters, not confided to legal counsel, must be disclosed when required for the purposes of justice.⁷ By it neither penitential confessions made to the minister or to members of the party's own Church, nor even secrets confided to a Roman Catholic priest in the course of confession, are privileged.⁸ In many of the American States, however,

¹ Gr. Ev. § 247, in great part.

² See note ⁶, to § 916.

³ Ante, § 879, and notes.

⁴ Mascardus, after observing that, in general, persons coming to the knowledge of facts under an oath of secrecy are compellable as witnesses to disclose them—states that confessions to a priest are not within the operation of the rule, since they are made not so much to the priest as to the Deity whom he represents. 1 Mas. de Prob., Quæst. v. n. 51; id. Concl. 377. Vide Farin. Op., Tit. 8, Quæst. 78, n. 73.

⁵ Tait, Ev. (Sc.) 386, 387; Alison, Pract. of Cr. L. (Sc.) 586; 2 Dickson, Ev. (Sc.) 937—939.

⁶ While the law of the Established Church of England encourages a penitent to confess his sins "for the unburthening of his conscience, and to receive spiritual consolation and ease of mind," yet even by its law the minister, to whom the confession is made, is merely excused

from presenting the offender to the civil magistrate, and enjoined not to reveal the matter confessed, "under pain of irregularity." Const. & Can. 1 J. 1, Can. cxiii.; 2 Gibson, Cod. p. 963.

⁷ R. v. Gilham, 1828. As to this case, see supra, n. ⁶ to § 916.

⁸ Butler v. Moore, 1802, McNally, Ev. 253—255; Anon., 1693 (Holt, C.J.); Du Barré v. Livette, 1791; Com. v. Drake, 1818 (Am.). In Broad v. Pitt, 1828, Best, C.J., however, said, that he, for one, would never compel a clergyman to disclose communications made to him by a prisoner; but that if he chose to disclose them, he would receive them in evidence. In R. v. Griffin, 1853, Alderson, B., is reported to have gone further, and to have expressed an opinion that communications made by a prisoner to a clergyman ought not to be disclosed. See, also, R. v. Hay, 1860; Joy on Conf. (Ir.), 49—58; Jer. Taylor's Sermon on the Anniversary of Gunpowder

confessions made to a priest or other minister of religion in that capacity are rendered privileged by express statutory enactment.¹

§ 918. Accordingly privilege, in its full extent, applies only between a client and his legal adviser.² But it also to some extent exists between employer and employed with regard to communications passing between them. An employer must, for instance, produce reports, &c., made by his servants in the *ordinary* course of their employment; but he will not be compelled to produce those made with a view to and in contemplation of anticipated litigation.³ And reports, &c., obtained after the controversy has arisen (or post litem motam) are privileged, and will not be ordered to be produced,⁴—and this even though an offer has been made which is in fact based upon them.⁵ Moreover, with respect to the *production of title-deeds*, the protection has been held applicable to the case of *trustees* and *mortgagees*, and they cannot be compelled either to produce the deeds of the cestuis que trust, or mortgagors, or to give parol evidence of their contents.⁶

§ 918A. Further, whenever a party is justified in refusing to produce an instrument, he in general cannot be forced to disclose its contents; although some few dicta, or even decisions,⁷ to the contrary may be found. Alderson, B., remarks,⁸ “It would be perfectly illusory for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate.”⁹

§ 919. The protection afforded to professional confidence applies

Treason, 6th vol. of his Works, pp. 614—622, ed. 1828; and a very learned pamphlet by the late Mr. Badeley on the Privilege of Religious Confessions in English Courts of Justice, publ. in 1865.

¹ See Greenleaf on Evidence, 15th ed., 1892, note to § 248.

² Thomas v. Rawlings, 1859.

³ See MacCorquodale v. Bell, 1876.

⁴ Friend v. L. C. & D. Rail. Co., 1877; Southwark, &c. Co. v. Quick, 1878, C. A.

⁵ Cooper v. Metrop. Bd. of Works, 1883, C. A.

⁶ Davies v. Waters, 1842; R. v. Upper Boddington, 1826; Chichester v. M. of Donegal, 1870 (Giffard, L.J.). See Few v. Guppy, 1830. Also, ante, § 458.

⁷ See Cocks v. Nash, 1833 (Gurney, B.); Marston v. Downes, 1834; observed upon (Rolfe, B.) in Davies v. Waters, 1842.

⁸ Davies v. Waters, 1842.

⁹ See further post, § 921.

though the client be in no way before the court.¹ The rule which excludes hearsay prevents, indeed, this question from often arising with respect to mere oral communications, but it has nevertheless sometimes arisen on occasions when a solicitor has been called upon, either by subpoena duces tecum or otherwise, to produce a document with which he has been confidentially intrusted by some *stranger* to the suit. In such a case, if the solicitor claims the privilege of the client, he will be protected not only from producing the deed or other paper, but from answering any question with respect to its nature.² Moreover, although on several occasions the court has inspected the document, and pronounced upon its admissibility, according as its production has appeared to be prejudicial or not to the client,³ yet in strict law, the judge ought not to look at the writing to see whether it is a document which may properly be withheld.⁴ The protection exists where documents called for are in the hands of solicitors for the trustees of bankrupts⁵—solicitors, agents, steward or others—for instance. Where the client or principal would have been entitled, if called as a witness, to withhold a document, the solicitor, agent, or steward cannot be compelled, though he will be permitted, to produce it.⁶ In such a case, however, if both the client and solicitor, or principal and agent, concur in refusing to produce a document, the party calling for it may give secondary evidence of its contents.⁷

§ 920.⁸ This protection, though confined to communications between a client and his legal adviser,⁹ extends to all the necessary organs by which such communications are effected; and therefore an *interpreter*,¹⁰ or an *intermediate agent*,¹¹ is under the

¹ *R. v. Withers*, 1811 (Ld. Ellenborough).

² *Volant v. Soyer*, 1853. See, also, *Bursill v. Tanner*, 1885.

³ 1 Ph. Ev. 175; *Doe v. Langdon*, 1848; *Copeland v. Watts*, 1815; *Ditcher v. Kenrick*, 1824; *Doe v. Thomas*, 1822.

⁴ *Volant v. Soyer*, 1853.

⁵ *Laing v. Barclay*, 1821; *Bateson v. Hartsink*, 1801; *Cohen v. Templar*, 1817; *Hawkins v. Howard*, 1824; *Corsen v. Dubois*, 1816; *Bull v. Loveland*, 1830. It was at one time thought that the production in such cases was a matter of public duty. *Pearson v. Fletcher*, 1803 (Ld. El-

lenborough).

⁶ *Hibberd v. Knight*, 1848. See ante, § 458.

⁷ *Ditcher v. Kenrick*, 1824 (Am.); *R. v. Hunter*, 1829. As to the cases where a witness may refuse to produce his deeds, or to disclose their contents, see ante, §§ 457—460.

⁸ Gr. Ev. § 239, in part.

⁹ *Thomas v. Rawlings*, 1858.

¹⁰ *Du Barré v. Livette*, 1791, explained in *Wilson v. Rasdall*, 1792, as reported 4 T. R. 756; *Jackson v. French*, 1829 (Am.); *Andrews v. Solomon*, 1816 (Am.); *Parker v. Carter*.

¹¹ *Bustros v. White*, 1876 (Jessel,

same obligation as the legal adviser himself; and if the legal adviser has communicated with such person, he will be as much bound to silence as if he had communicated directly with his client.¹ The rule also extends to a *solicitor's town or local agent*² (who is considered as standing in precisely the same situation as the solicitor) to a Scotch solicitor, and to a Scotch law agent practising in England;³ and it also is applicable to a case submitted, after the institution of the suit, to a *foreign* counsel, and to his opinion thereon.⁴ A barrister's or a solicitor's *clerk*, moreover, cannot be permitted to disclose facts coming to his knowledge in the course of employment, unless the barrister or solicitor himself might have been interrogated respecting them.⁵ Where a person is sent abroad *by solicitors* to collect evidence respecting a pending suit, letters written by him either to the party himself or to his solicitors on the subject of the evidence are privileged communications.⁶

§ 921. It was said by Lord Cranworth,⁷ that "there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they were addressed to communicate them in professional confidence to his solicitor,"⁸ but it is submitted his lordship referred only to communications *ante litem motam*.

§ 922. As the privilege is established, not for the benefit of the

M.R.); *Bunbury v. Bunbury*, 1833; *Walker v. Wildman*, 1821; *Hooper v. Gumm*, 1862; *Churton v. Frewen*, 1865; *Jenkins v. Bushby*, 1866; *Reid v. Langlois*, 1849 (Ld. Cottenham). See *Doe v. Jauncey*, 1837.

¹ *Carpmael v. Powis*, 1846 (Ld. Lyndhurst), recognising *Walker v. Wildman*, 1821.

² *Parkins v. Hawkshaw*, 1817 (Holroyd, J.); *Goodall v. Little*, 1851.

³ *Lawrence v. Campbell*, 1859.

⁴ *Bunbury v. Bunbury*, 1833.

⁵ *Taylor v. Forster*, 1825 (Best, C.J.), cited with approbation in *Foster v. Hall*, 1831 (Am.), as reported in 12 Pick. 93; *Foot v. Hayne*, 1824; *Chant v. Brown*, 1851-2; *Bowman v. Norton*, 1831 (Tindal, C.J.); *R. v. Upper Boddington*, 1826 (Bayley, J.); *Mills v. Oddy*, 1834; *Jackson*

v. French, 1829 (Am.).

⁶ *Steele v. Stewart*, 1843-4; *Cossey v. Lond. Bright. & Ry. Co.*, 1870; *Lafone v. Falkland Islands Co.*, 1857; *Hooper v. Gumm*, 1862; *Walsham v. Stainton*, 1863; *Ross v. Gibbs*, 1869; *Bullock v. Corry*, 1878.

⁷ See ante, § 918, and post, § 1795.

⁸ *Goodall v. Little*, 1850-1; recognised (Ld. Truro) in *Glyn v. Caulfield*, 1851; and in *Betts v. Menzies*, 1857 (Wood, V.-C.). See, also, *Smith v. Daniell*, 1875, where an opinion, given confidentially and as a friend by Ld. Westbury on a case submitted to him, was ordered to be produced. But see *Jenkins v. Bushby*, 1866; and *Hamilton v. Nott*, 1873 (Malins, V.-C.).

solicitor, but for the protection of the client,¹ it extends to an executor in regard to papers coming to his hands as the personal representative of the solicitor.² If, however, a solicitor, in violation of his duty, voluntarily communicate to a stranger the contents of an instrument with which he was confidentially intrusted, or permit him to take a copy, the secondary evidence so obtained would, it seems, be admissible in case of notice to produce the original being duly given, and the production resisted on the ground of privilege.³ Indeed,⁴ it has more than once been laid down, that the mere fact that papers and other subjects of evidence have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue. For the court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question.⁵

§ 923. To protect communications, they must have been made to the legal adviser while he was either acting, or at least considered by the client as acting,⁶ in that capacity. It is not, however,⁷ required that there should have been any regular *retainer*, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character.⁸ It would also seem that if a person be consulted confidentially, under the erroneous supposition that he is a lawyer, he cannot be compelled to disclose the matters communicated.⁹ But where a prisoner in custody on a charge of forgery, wrote to a friend, requesting him "to ask Mr. G. or any

¹ *Herring v. Cloberry*, 1842 (Ld. Lyndhurst).

² *Fenwick v. Reed*, 1816.

³ *Cleave v. Jones*, 1852 (Parke, B.); *Lloyd v. Mostyn*, 1842 (id.), questioning contrary decision of Bayley, J., in *Fisher v. Heming*, 1809, cited 1 Ph. Ev. 170. In *Lloyd v. Mostyn*, Parke, B., likened the case to that of an instrument being stolen, and a correct copy taken, and asked whether it would not be reasonable to admit such copy? If the client sustains any injury from such improper disclosure being made, an action will lie against the solicitor. *Taylor v. Blacklow*, 1836.

⁴ Gr. Ev. § 254A, in great part.

⁵ *Legatt v. Tollervay*, 1811; *Jordan v. Lewis*, 1739—40; *Doe v. Date*, 1842; *Com. v. Dana*, 1841 (Am.).

⁶ *Smith v. Fell*, 1841. There a communication was held to be privileged, which was made by a party to a solicitor, under the impression that the latter acceded to a request to act as his legal adviser.

⁷ Gr. Ev. § 241, in part.

⁸ *Foster v. Hall*, 1831 (Am.). See, also, *Bean v. Quimby*, 1829 (Am.).

⁹ *Calley v. Richards*, 1854 (Romilly, M.R.), questioning *Fountain v. Young*, 1807 (Sir J. Mansfield).

other attorney" a question respecting the punishment of forgery, the letter was admitted in evidence, on the ground that it did not appear that the relation of attorney and client ever subsisted between Mr. G. and the prisoner.¹ If, too, a party were to go to a person not a solicitor to discount a forged note, or to raise money on a forged will, what passed at the interview would of course not be privileged.²

§ 924—5. It has long been established that, where the *client* himself is the *party interrogated*,³ all communications between him and his solicitor, whether pending and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not in contemplation of, or with reference to, that litigation, are protected; as also are communications made respecting the subject-matter in question, pending, or in contemplation of, litigation on the same subject with other persons, with a view of asserting the same right.⁴ Even communications which have passed between a client and solicitor *before any dispute* had arisen between the client and his opponent, are, it is now settled, privileged from production.⁵

¹ *R. v. Brewer*, 1834 (Park, J.).

² *R. v. Farley*, 1846. As to solicitors, see ante, § 912; post, § 929.

³ See *Maccann v. Maccann*, 1862 (Cresswell, J.O.).

⁴ *Holmes v. Baddeley*, 1844; *Wigram, V.-C.*, in *Ld. Walsingham v. Goodricke*, 1843, citing *Bolton v. Corp. of Liverpool*, 1833; *Hughes v. Bidulph*, 1827; *Goodall v. Little*, 1850-1; *Thompson v. Falk*, 1852; *Vent v. Pacey*, 1830; *Clagett v. Phillips*, 1842; *Combe v. Corp. of London*, 1842. See, also, *Woods v. Woods*, 1844; *Reece v. Trye*, 1846; *Adams v. Barry*, 1843; *Knight v. M. of Waterford*, 1836; *Curling v. Perring*, 1835; *Lyell v. Kennedy*, 1883, H. L.; and *Nias v. North. & East. Ry. Co.*, 1838. These cases overrule *Preston v. Carr*, 1826; and *Newton v. Beresford*, 1831. See *Ld. Walsingham v. Goodricke*, 1843, as reported, 3 Hare, 129.

⁵ *Minet v. Morgan*, 1873; overruling *Ld. Walsingham v. Goodricke*, 1843, in which *Wigram, V.-C.*, reluctantly submitted to *Radcliffe v.*

Fursman, 1730. See, also, *Penraddock v. Hammond*, 1847; *Hawkins v. Gathercole*, 1850-51; *Beadon v. King*, 1849; and *Greenlaw v. King*, 1838, in which last case *Ld. Langdale* compelled a son and heir to discover a case, which had been submitted to counsel by his father, and had come with the estate to his hands. The contrary doctrine to that stated in the text was propounded in *Radcliffe v. Fursman*, 1730, by the House of Lords, at a time when the subject of professional confidence was not developed to the same extent as it is at the present day (per *Wigram, V.-C.*, in *Ld. Walsingham v. Goodricke*, 1843, as reported, *supra*); but although *Radcliffe v. Fursman* was disapproved of by almost every judge under whose notice it was subsequently brought, and its principle was more than once successfully exposed and refuted (see *Bolton v. Corp. of Liverpool*, 1833 (*Ld. Brougham*); *Pearse v. Pearse*, 1846 (*K.-Bruce, V.-C.*); *Walker v. Wildman*, 1821; *Preston v. Carr*, 1826; *Ld. Walsingham v.*

§ 926. If a solicitor be *employed for two parties*, as for mortgagor and mortgagee, and peruse on behalf of the former his abstracts of the title, he cannot, as against him, disclose their contents;¹ and where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties, he was not allowed to produce it at the trial against the interest of the purchaser's devisees, though with the consent of the vendor.² If, however, a solicitor, acting as such for opposite parties, has an offer made to him by the one for the purpose of being communicated to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party.³ Where two persons, having a dispute about a claim made by one of them upon the other, went together to a solicitor, when one of them made a statement, and instructed the solicitor to write a letter to a third party on the subject of the claim,—in a subsequent action between these two persons, both the statement and the letter were held admissible;⁴ and if a wife be induced by her husband to deal with her separate interest under the advice of her husband's solicitor, the latter would naturally be regarded by the client as acting for both husband and wife, and, consequently, in the event of any dispute arising between the married couple, each party is entitled to call for the production, and to have full inspection, of all documents that may have come into the possession of the solicitor in the course of the transaction.⁵ In all these cases the question would seem to be, was the communication made by the party to the witness in the character of his own

Goodricke, 1843; *Bp. of Meath v. M. of Winchester*, 1836, H. L.; *Pearse v. Pearse*, 1846. See, also, two articles in *Law Mag.* vol. xvii. pp. 51—74, and vol. xxx. pp. 107—123), it was still reluctantly followed till *Selborne, L.C.*, had the hardihood to set it at nought in 1873, in the important case of *Minet v. Morgan*, 1876, *supra*; followed by *Hall, V.-C.*, in *Turton v. Barber*, 1874; and in *Bacon v. Bacon*, 1876; and by *C. P. D.* in *Mostyn v. West Mostyn Coal & Iron Co.*, 1876. See, also, *Bullock v. Corry*, 1878. The view of *Selborne, L.C.*, also derives support from *Wilson v. Northampton*

& *Banbury Junction Rail. Co.*, 1872 (*Malins, V.-C.*); *Manser v. Dix*, 1855 (*Wood, V.-C.*); *Macfarlan v. Rolt*, 1872 (*Wickens, V.-C.*); and *Calley v. Richards*, 1854 (*Romilly, M.R.*).

¹ *Doe v. Watkins*, 1837. But see *R. v. Avery*, 1838, cited post, § 929.

² *Doe v. Seaton*, 1834.

³ *Baugh v. Cradocke*, 1832; *Cleve v. Powel*, 1832; *Perry v. Smith*, 1842; *Reynell v. Sprye*, 1846.

⁴ *Shore v. Bedford*, 1843. See, also, *Griffith v. Davies*, 1833; and *Weeks v. Argent*, 1847.

⁵ *Warde v. Warde*, 1851.

exclusive solicitor? If it was, the bond of secrecy is imposed upon the witness; if it was not, the communication will not be privileged.¹

§ 927.² The protection does not cease with the termination of the suit, or other litigation or business, in which the communications were made; nor is it affected by the party's ceasing to employ the solicitor, and retaining another, nor by any other change of relation between them, nor by the solicitor's being struck off the rolls,³ nor by his becoming personally interested in the property, to the title of which the communications related,⁴ nor even by the death of the client. The seal of the law, once fixed upon the communications, *remains for ever*,⁵ *unless it be removed either by the party himself*,⁶ in whose favour it was placed, or perhaps, in the event of his death, by his personal representative;⁷ and, therefore, if the client becomes a bankrupt, his trustee cannot waive the privilege without his particular permission.⁸ Neither does the client waive his privilege by calling the solicitor as a witness, unless he also examines him in chief to the matter privileged;⁹ and even in that case, it has been held, in Ireland, that the cross-examination must be confined to the point upon which the witness has been examined in chief.¹⁰

§ 928. When it is said that the privilege does not terminate with the death of the client, cases where disputes arise between the client's representatives and strangers, and those in which both the litigating parties claim under the client, must be distinguished. Where the litigation is between a client's representatives and strangers, the protection, doubtless, survives for the benefit of those who represent the client; but when it is between litigating parties

¹ *Perry v. Smith*, 1842 (Parke, B.); *Reynell v. Sprye*, 1846.

² Gr. Ev. § 243, in part.

³ *Ld. Cholmondeley v. Ld. Clinton*, 1815.

⁴ *Chant v. Brown*, 1849.

⁵ *Wilson v. Rastall*, 1792 (Buller, J.); *Parker v. Yates*, 1827. But see *Charlton v. Coombes*, 1863 (Stuart, V.-C.).

⁶ *Merle v. More*, 1826 (Best, C.J.); *Baillie's case*, 1778. "If the client be willing, the court will compel the

counsel to discover what he knows" (North, C.J., in *Lea v. Wheatley*, 1678). See, also, *Blenkinsop v. Blenkinsop*, 1848, and *Chant v. Brown*, 1849.

⁷ *Doe v. M. of Hertford*, 1850.

⁸ *Bowman v. Norton*, 1831 (Tindal, C.J.).

⁹ *Vaillant v. Dodemead*, 1742; *Waldron v. Ward*, 1654; *Bate v. Kinsey*, 1834.

¹⁰ *M'Donnell v. Conry*, 1843 (Ir.) (*Richards, B.*).

who both claim under the client, there is no reason why the privilege should belong to one side rather than to the other. Consequently, where the question was, whether certain executors were or were not trustees for the testator's next of kin, the evidence of the solicitor who prepared the will as to what had passed between him and the testator on the subject of the will, has been received on behalf of the next of kin.¹

§ 929. Whether the protection can be removed without the client's consent, in cases where the interests of *criminal justice* require the production of the evidence, is a point upon which there are conflicting decisions.² The prevalent opinion (and it is expressed in the last edition of Greenleaf on Evidence as being the law in America³) appears to be that even the interests of criminal justice do not justify the production of evidence which is privileged.⁴ But where a party having possessed himself of the title-deeds of a deceased person, placed a forged will of the deceased amongst them, and then sent the whole to his solicitor, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the solicitor might find the will and act upon it,—the judges unanimously held, that the solicitor was bound to produce the will on such party's trial for forgery, it not having been intrusted to him in professional confidence, *even if that would have made any difference*.⁵ Where, too, on a trial for forgery of a will,

¹ Russell v. Jackson, 1851 (Turner, V.-C.).

² R. v. Tylney, 1849. Where a party had intrusted a solicitor with a promissory note, and had instructed him to bring an action upon it, Holroyd, J., held that the solicitor ought not to produce the note, on the trial of a subsequent indictment against his client for forgery (R. v. Smith, 1822, cited in 1 Ph. Ev. 171; see, also, R. v. Hankins, 1849); and a similar decision appears to have been pronounced by the Court of King's Bench in the time of Ld. Mansfield (R. v. Dixon, 1765; see, also, Anon., 1811). On the other hand, Patteson, J., has compelled a solicitor, who had been employed by a mortgagor and mortgagee to negotiate a loan between them, and had received from the former a forged will as part of his

title-deeds, to produce the will on a trial of the mortgagor for forging that instrument (R. v. Avery, 1838. In R. v. Tuffs, 1848, the learned judge admitted that the language which he, in the case cited, is reported to have used, to the effect that R. v. Smith, 1822, was not law, was too strong. See, also, ante, §§ 912, 923). But matrimonial proceedings are *civil* proceedings, though the question at issue may involve the sin of adultery. Branford v. Branford, 1879.

³ Greenleaf on Evidence, 14th ed. (1892), § 243.

⁴ But it must be remembered that no privilege can exist to protect it where crime is shown to exist. See R. v. Cox and Railton, 1884, ante, § 912.

⁵ R. v. Hayward, 1846. See R. v. Jones, 1846; R. v. Brown, 1862; and R. v. Downer, 1880. Clearly the

it appeared that prisoner's wife had taken the will to a solicitor, and asked him to advance money upon it for her husband, but he refused to do this, and took a copy of the will, it was held that such copy was admissible as secondary evidence, and that the conversation between the wife and the solicitor was not privileged.¹

§ 930.² The privilege of a solicitor does *not* exist in eight classes of cases, which are as follows :³ (1) where the knowledge was not acquired by the solicitor *solely* by his being employed professionally, but was in some measure obtained by his acting as a *party* to the transaction, and the more especially so, if this transaction was fraudulent ;⁴ (2) or where the communication was made *before* the solicitor *was employed* as such, or *after* his employment had *ceased* ; (3) or where, though consulted by a friend because he was a solicitor, he had refused to act as such, and was therefore only applied to *as a friend* ; (4) or where the information was obtained, not exclusively from the client, but also from some other independent source ;⁵ (5) or where it could not be fairly stated that any communication had been made, as, for instance, where something that then took place became known to a professional adviser from his having been brought to a certain place by the circumstance of his being the professional adviser of a party, but *any other man*, if there, would have been *equally cognisant* of such fact ;⁶ (6) or where the matter communicated was *not in its nature private*, and

principle of the decision in *R. v. Cox and Railton* (ante, § 912), now would cover such a case as this.

¹ *R. v. Farley*, 1846. This case, however, is scarcely an authority on either side of the question ; for the judges took the distinction that the solicitor consulted was not the prisoner's own legal adviser.

² Gr. Ev. § 244, in great part.

³ Besides those here stated, there is the following exception. In taking a partnership account between solicitors, semble that the plaintiff is entitled to the discovery and production of papers material to the account, though they relate to professional business, and the effect of their production must be that some stranger will become acquainted with matters intrusted to the partners in confidence. *Brown v. Perkins*, 1843. This obviously rests on necessity, for

otherwise no account could ever be taken between solicitors in partnership.

⁴ In *Follett v. Jefferyes*, 1850, Rolfe, V.-C., said, "It is not accurate to speak of cases of fraud, contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence ; and no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of a solicitor." See, also, *Charlton v. Coombes*, 1863 ; and *Kelly v. Jackson*, 1849 (Ir.).

⁵ *Lewis v. Pennington*, 1860 (Romilly, M.R.) ; *Marsh v. Keith*, 1860.

⁶ *Brown v. Foster*, 1857, cited post,

could in no sense be termed the subject of a confidential disclosure;¹ (7) or where it had *no reference to professional employment*, though disclosed while the relation of solicitor and client subsisted;² (8) or where the solicitor, having made himself a *subscribing witness* and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove. In all such cases, it is plain that the solicitor is not called upon to disclose matters which he can be said to have learned by communication with his client, or on his client's behalf; matters which were so committed to him in his capacity of solicitor; and matters which in that capacity alone he had come to know.³ The eight classes of cases may now be discussed in detail.

§ 931. The first of the cases just mentioned is where the solicitor has obtained his knowledge as a party. Thus, if a solicitor, having been engaged in a conspiracy, turn informer, he cannot be prevented from disclosing what he knows of the transaction, though he may have been employed by some of the guilty parties in his professional character, and have acquired much of his knowledge in consequence of that connection.⁴ On the ground, too, that his knowledge was not obtained *merely* as a solicitor, disclosure has been compelled both of a confession made to a solicitor by his client before his retainer respecting an erasure in a will,⁵ and also of a gratuitous conversation after the compromise of a suit in which the client stated that he was glad the action was settled, as the promissory note on which it was founded had been indorsed to him without consideration, and with notice that it was void as being

§ 934. Even such a matter as stated in the text has been held privileged in some of the cases.

¹ See *Doe v. M. of Hertford*, 1850.

² *Goodall v. Little*, 1851.

³ Per *Ld. Brougham*, in *Greenough v. Gaskell*, 1833. See, also, *Desborough v. Rawlins*, 1838; *Bolton v. Corp. of Liverpool*, 1833; *Annesley v. Ld. Anglesea*, 1743 (Ir.).

⁴ *Greenough v. Gaskell*, 1833, as reported 1 *Myl. & K.* 103, 104, 109 (*Ld. Brougham*). In *Duffin v. Smith*, 1792, usury in a mortgage was proved by the plaintiff's solicitor, who prepared the deed, and who was called by the defendant to prove the con-

sideration usurious. The judge (*Ld. Kenyon*) who admitted this evidence assumed that the solicitor had, by his conduct, become a party to the transaction; but as the facts do not warrant this assumption, the case cannot be supported at the present day (see *Ld. Brougham's* remarks in *Greenough v. Gaskell*, 1833, as reported, 1 *Myl. & K.* 109, and also ante, § 929), so that it is only valuable as recognising the general principle, that if a solicitor acts as a party, no knowledge he obtains will be privileged.

⁵ *Cutts v. Pickering*, 1672.

mixed up with a lottery transaction.¹ On the other hand, where a person, having possession of a deed in the character of trustee to the defendant, had first obtained a knowledge of its contents while acting as his solicitor, the knowledge thus obtained was held to be privileged;² and where a solicitor became a trustee under a deed for the benefit of his client's creditors, subsequent communications made to him by the client were held privileged.³

§ 932. The second class of cases in which a solicitor's knowledge is not privileged is where it was acquired *before* or *after* his professional employment. Accordingly, where a trustee for two parties had acted as solicitor for one, in certain disputes which had arisen between the two on the subject of the trusts, it was held that, inasmuch as he had been voluntarily placed in a situation inconsistent with his duty as trustee for both parties, the communications between him and his client were not privileged as against the other cestui que trust;⁴ and a solicitor who had been confidentially consulted, but had not been professionally employed, because he was then acting as undersheriff, was held bound to disclose what had been communicated to him.⁵ On the like ground⁶ that the knowledge gained by him was not by reason of its being intrusted to him in his professional character, but merely by his being present at the conversation,⁷ a witness called by the plaintiff has also been permitted to state a conversation, in which the defendant proposed a compromise to the plaintiff, although, when the conversation took place, the witness was attending as solicitor for the defendant. If, too, a solicitor, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him;⁸ while if communications from an adverse party be made, either directly to the solicitor for the purpose of being communicated to the client,⁹ or

¹ Cobden v. Kendrick, 1791.

² Davies v. Waters, 1842. There, the witness, as *trustee*, might equally have refused to state the contents of the deed, but it was objected in Banc that this point was not raised at Nisi Prius. See ante, § 918.

³ Pritchard v. Foulkes, 1837.

⁴ Tugwell v. Hooper, 1847.

⁵ Wilson v. Rastall, 1792. See Calley v. Richards, 1854.

⁶ Griffith v. Davies, 1833. See, also, Shore v. Bedford, 1843; Weeks v. Argent, 1847.

⁷ Per Alderson, B., in Davies v. Waters, 1842.

⁸ Per Parke and Patteson, JJ., 1833; commenting on and questioning Gainsford v. Grammar, 1809. See, also, Ripon v. Davies, 1833; and Reynell v. Sprye, 1846.

⁹ Spenceley v. Schulenburg, 1806.

to the client himself in the presence of the solicitor,¹ the solicitor is not at liberty to withhold them. A solicitor is indeed bound, it seems, to produce all letters, and to disclose all information, communicated to him from *collateral* quarters.²

§ 933. The third class of cases in which there is no privilege is where the solicitor has been consulted *as a friend* on matters of fact, and not as a *legal* adviser. In this case, he must disclose all questions put to him by his client as to *matters of fact*, as distinguished from those put with the view of obtaining *legal advice*, together with his answers thereto.³ On a question⁴ whether the client had committed an act of bankruptcy on a particular day on which he had inquired of his solicitor whether he could safely attend a particular meeting of his creditors without being arrested for debt, and by the solicitor's advice had remained in the latter's office for two hours to avoid being arrested, and till the solicitor returned from the meeting, even what had passed between the solicitor and his client was allowed to be given in evidence. Lord Tenterden observing,⁵ that "a man could hardly ask, *as matter of law*, whether he would be free from arrest while attending a voluntary meeting of creditors, though he might well ask, *as matter of fact*, from the person at whose suggestion the creditors had been convened, whether any arrangement had been made with the creditors to prevent an arrest;" and his lordship added, "The solicitor gives no *legal* advice, his answer implying that no arrangement had been made, but that he would see at the meeting whether

There the solicitor was held bound to discover the contents of a notice to produce documents, which he had received from the opposite solicitor. See, also, *Ford v. Tennant*, 1863 (Romilly, M.R.); *Gore v. Bowser*, 1851 (Parker, V.-C.); *Paddon v. Winch*, 1870 (James, V.-C.).

¹ *Desborough v. Rawlins*, 1838 (Ld. Cottenham).

² Thus, a communication between a solicitor and one of his client's witnesses as to the evidence to be given by the witness, is not privileged: *Mackenzie v. Yeo*, 1841. But, semble, a solicitor is not bound to produce the "proof" of a witness's evidence, which he had prepared for

insertion in his counsel's brief (*Bovill, C.J.*, in the *Tichborne* case, 28th Feb. 1872, MS.).

³ *Sawyer v. Birchmore*, 1835 (Ld. Cottenham); *Spenceley v. Schulenburg*, 1806; *Desborough v. Rawlins*, 1838.

⁴ *Bramwell v. Lucas*, 1824; observed upon (Ld. Brougham) in *Greenough v. Gaskell*, 1833, as reported 1 Myl. & K. 113—115; and also (Ld. Cottenham) in *Desborough v. Rawlins*, 1838, as reported 3 Myl. & Cr. 520—522.

⁵ *Bramwell v. Lucas*, 1824, as reported 2 B. & C. 749, 750. The case, however, seems very open to doubt on the facts.

any could be effected; and he recommends his client, not as a *legal adviser*, but as any agent or any friend might have recommended, to stay where he was till that matter of fact could be ascertained." The fourth class of cases in which no privilege exists, namely, where the solicitor's knowledge has come from an independent source, and not from the client, is so obvious that it does not require illustration.

§ 934. The fifth of the above class of cases in which there is no professional privilege, is where the legal adviser's knowledge of a fact was not communicated directly to him by his client, but he came to know of it during the progress of a trial, and it would have been equally known to any other man who had been present. For instance, where¹ counsel had attended before a magistrate on behalf of a man charged with embezzlement, when the prosecutor had produced a book, in which the accused, contrary to his duty, had omitted to enter a sum of money received by him, and which was on a subsequent examination found to contain the entry: it was held at a trial for malicious prosecution, that the counsel might give evidence that the entry was not in the book at the time of the first examination. Similarly, a solicitor may be called, either to prove his client's handwriting, though he be acquainted with it only from having seen him sign documents in the cause;² or to disclose the name of the person by whom he was retained, in order to let in the declarations and admissions of the real party in interest;³ or to discover when and to whom he parted with his client's title-deeds, and in whose possession they are,⁴ so as to let in secondary evidence of the contents. In the latter case the solicitor will be bound to answer whether the documents are in his possession or elsewhere in court, even though they may have been obtained from his client in the course of communication with reference to the cause.⁵

¹ *Brown v. Foster*, 1857. See, also, *Wheatley v. Williams*, *infra*, § 937A.

² *Hurd v. Moring*, 1824 (*Abbott, C.J.*); *Johnson v. Daverne*, 1821 (*Am.*).

³ *Bursill v. Tanner*, 1885, *C. A.*; *Levy v. Pope*, 1829 (*Parke, J.*); *Brown v. Payson*, 1833 (*Am.*).

⁴ *Banner v. Jackson*, 1847 (*K. Bruce, V.-C.*), reluctantly following *Stanhope v. Knott*, undated, and *Kingston v. Gale*, 1676.

⁵ *Dwyer v. Collins*, 1852; *Coates v. Birch*, 1841; *Bevan v. Waters*, 1828 (*Best, C.J.*); *Eicke v. Nokes*, 1829; *Roupell v. Haws*, 1863 (*Channell, B.*).

§ 935. The sixth class of cases in which privilege was stated not to exist, is where the information is not in its nature private, or such that it can be considered as having been given in confidence. On this ground a legal adviser is (as we have just seen) bound to furnish his client's *name*,¹ and any information in his power as to his address, especially if the client be a ward in Chancery, who is attempting to conceal his residence from the court;² he may be called to identify his client as the person who has put in any pleading, or sworn any affidavit, because these acts, so far from being secrets, are in their very nature matters of publicity;³ from one case it would even seem that he may be compelled to divulge the character in which his client employed him, as, for instance, whether as executor, or trustee, or on his own private account;⁴ and a solicitor, who has prepared a will at the instance of a party benefited by it, is not privileged to withhold from the Probate Division of the High Court any facts which are connected with contemporaneous business transacted between the testator and himself on account of his client the legatee, when his opinion of the testator's capacity to make a will is in any degree founded on such facts.⁵

§ 936. The seventh class of cases as to which privilege cannot be claimed, was stated to be where the communications were not in their nature private, or made with reference to professional employment, and were, therefore, so far as professional relations were concerned, quite unnecessary. Accordingly a prosecutor's solicitor has been allowed to state that, pending the proceedings on the indictment, his client had observed to him that he would give a large sum to have the prisoner hanged;⁶ and, in an action by a solicitor for his bill, where the question was whether he had been employed by the defendant or by a third party, a statement made by the plaintiff to his solicitor, on introducing such third party to

¹ *Bursill v. Tanner*, 1885, C. A.; ante, n. to § 934.

² *Ramsbotham v. Senior*, 1869 (Malins, V.-C.); *Burton v. Ld. Darnley*, 1869; *Ex parte Campbell*, 1870. But see *Heath v. Crealock*, 1873 (Bacon, V.-C.).

³ *B. N. P.* 284, b; *Studdy v. Sanders*, 1823; *Doe v. Andrews*, 1778 (Ld. Mansfield); cited by Ld. Brougham in *Greenough v. Gaskell*, 1833, as reported 1 Myl. & K. 108,

overruling *R. v. Watkinson*, 1739-40.

⁴ *Beckwith v. Benner*, 1834 (Gurney, B.). It has, however, been held in America that counsel could not state whether they were employed to conduct an ejectment for their client, as *landlord of the premises*: *Chirac v. Reinicker*, 1826 (Am.).

⁵ *Jones v. Goodrich*, 1844, P.C.

⁶ *Annesley v. Ld. Anglesea*, 1743; *Cobden v. Kendrick*, 1791, cited ante, § 931.

him, was held not to be privileged.¹ The eighth, and last, class of cases in which communications are not privileged, arises where a solicitor *attests an instrument* which his client executes. In this event he may be compelled, either to prove the execution, or to disclose all that passed at that time, even though such evidence may establish the invalidity of the deed; for by voluntarily becoming a subscribing witness he makes himself a public man, and pledges himself to give evidence on the subject, whether he be called by the party by or to whom the deed is executed, or by any other person who claims an interest in the property.²

§ 937. Accordingly, where the assignees of a bankrupt, to establish that a conveyance made by a bankrupt to his son was fraudulent, called the bankrupt's solicitor, he was, as attesting witness to the deed, held bound to disclose what took place at the time of its execution.

§ 937A. In the case just cited, however, the very legal adviser who as an attesting witness was held not to be privileged, was also held to be privileged from stating what occurred during its concoction and preparation, and not liable to be asked whether it had not been subsequently destroyed, if the only knowledge he had, as to its concoction, preparation or destruction, was acquired from his confidential situation as solicitor.³ Moreover, a legal adviser cannot disclose in what condition an instrument was when it was intrusted to him by his client, as whether or not it then were stamped, or indorsed, or had an erasure upon it;⁴ nor even for what purpose his client brought it to him.⁵

§ 938.⁶ We have now seen that the first class of persons who, on grounds of public policy, are privileged from disclosing communications made to them as such, are *husband and wife*; and that the second class of such persons consists of *legal advisers*. The third class of persons who are privileged on the grounds mentioned above, are *judges, arbitrators, and counsel*, persons who are not

¹ Gillard v. Bates, 1840. See, also, Caldbeck v. Boon, 1872 (Ir.).

² Doe v. Andrews, 1778; Robson v. Kemp, 1803; Crawcour v. Salter, 1881 (Malins, V.-C.); Sandford v. Remington, 1793.

³ Robson v. Kemp, 1803 (Ld.

Ellenborough).

⁴ Wheatley v. Williams, 1836. Cf. Brown v. Foster, 1857, supra, § 934. See, also, B. N. P. 284, a; and Brown v. Payson, 1833 (Am.).

⁵ Turquand v. Knight, 1836.

⁶ Gr. Ev. § 249, in part.

compellable to testify as to matters in which they have been judicially or professionally engaged. They may, indeed, like ordinary persons, be called upon to speak to any foreign and collateral matters, which happened in their presence, while the trial was pending, or after it was ended.¹ It is considered dangerous, or at least highly inconvenient, to compel judges of courts of record to state what occurred before them in court; and on this ground the grand jury have been advised not to examine a chairman of quarter sessions, as to what a person testified in a trial in his court.² The general policy as to arbitrators is the same; and the courts will not disturb the deliberate decision of an arbitrator, by requiring him to disclose the grounds of his award, or what passed in his own mind when exercising his discretionary powers as to the matters submitted to him,³ unless indeed under very cogent circumstances, such as upon an allegation of fraud; for *Interest reipublicæ ut sit finis litium*.⁴ A judge or an arbitrator is, however, a *competent* witness, and may, by his own consent, be examined respecting the facts proved, or the matters claimed, at the trial or the reference.⁵ Moreover, he may be asked questions as to what passed before him, and as to what matters were presented to him for consideration, or for the purpose of showing that, as a fact, he has exceeded his powers, as, for instance, by awarding compensation for injuries not included in the matters submitted to him.⁶ Again, barristers cannot be forced to prove what was stated by them on a motion before the court.⁷ The like privilege has been strenuously claimed, though not expressly recognised, where a counsel was called upon as a witness to disclose a confidential negotiation, into which, on behalf of his client, he had entered with a third party, though the client himself waived all objection to the course of examination proposed.⁸

§ 939.⁹ The *fourth kind* of cases, in which evidence is excluded

¹ *R. v. E. of Thanet*, 1799; *Ponsford v. Swaine*, 1861.

² *R. v. Gazard*, 1838 (Patteson, J.).

³ *Duke of Buccleuch v. Metropolitan Board of Works*, *infra*.

⁴ *Johnson v. Durant*, 1831; *Ellis v. Saltau*, 1808; *Ponsford v. Swaine*, 1861; *Story*, Eq. Pl. §§ 599, 824, 825, n.; 2 *Story*, Eq. Jur. §§ 1457,

1498; *Anon.*, 1748.

⁵ *Martin v. Thornton*, 1796 (Ld. Alvanley).

⁶ *D. of Buccleuch v. Met. Board of Works*, 1872, H. L.

⁷ *Curry v. Walter*, 1796 (Eyre, C.J.).

⁸ *Baillie's case*, 1778.

⁹ *Gr. Ev.* § 250, in great part.

from motives of public policy, comprises *secrets of State*, or matters which concern the administration, either of penal justice, or of government, and the disclosure of which would be prejudicial to the public interest. The principle of the rule of exclusion is in both cases concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires. The protection to State Papers afforded by this principle extends, it is almost needless to say, to applications for discovery, and there are many instances of such applications.¹ In accordance with these principles, the public prosecutor is, in a prosecution carried on by him, not obliged (unless so ordered by the judge) to state who set him in motion.² In Crown prosecutions, and in informations for frauds committed against the revenue laws, witnesses for the Crown *will not*, on cross-examination, *be permitted to disclose* either the names of their employers, or the nature of the connection between them, or the names of the persons from whom they received information, or the names of those to whom they gave information, whether such last-mentioned persons were magistrates, or actually concerned in the executive administration, or were only the channel through which the communication was made to Government.³ Neither can a witness be asked whether he himself was the informer.⁴ Eyre, L. C. J., said⁵: “It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the detection is made, should not be unnecessarily disclosed.”

§ 940. The protection of this rule will be upheld, though the witness, in his examination in chief, has admitted that suggestions have been made to him on the part of the Government.⁶ The doctrine has been even carried so far, that a witness, who had consulted a private friend by whom he had been advised to communi-

¹ *Hennesy v. Wright*, 1888.

² *Marks v. Beyfus*, 1890, C. A.

³ *R. v. Watson*, 1817; *R. v. Hardy*, 1794; 1 Ph. Ev. 178—180.

⁴ *Att.-Gen. v. Briant*, 1846.

⁵ *Hardy's case*, 1794.

⁶ *R. v. O'Connell*, 1843 (Ir.). See, also, pp. 233, 240, of *Arm. & T.*, where the general doctrine was recognized and acted upon.

cate his information to Government, was held by a majority of the judges unable to disclose the name of his friend,¹ the judges thinking² that all questions tending to the discovery of the channels by which the information was given to the officers of justice were, upon the general principle of public convenience, to be suppressed; that all persons in that situation were protected from the discovery; and that, if an objection were raised to the question, it was no more competent for the defendant to ask who had advised the witness to give information, than to ask to whom he had given it in consequence of that advice, or to put any other question respecting the channel of communication.³ A witness may, however, be asked, whether the person to whom the information was communicated was a magistrate or not.⁴

§ 941. It may be doubted whether this rule of protection extends to ordinary prosecutions.⁵ Even when it applies,—as it unquestionably does whenever the Government is directly concerned,—it may sometimes, if rigidly enforced, be productive of great individual hardship; since, where a witness is giving an account of what occurred at a distant period, it is obviously material to ascertain whether he gave substantially the same account recently after the transaction; and if the object be to shake the credit of the witness, it is equally important to know whether a communication, which he asserts that he made to a certain person, was, in fact, ever so made. On the other hand, it is absolutely essential to the welfare of the State, that the names of parties who interpose in situations of this kind should not be divulged; for otherwise,—be it from fear, or shame, or the dislike of being publicly mixed up in inquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished.⁶

§ 942.⁷ For the same reasons of public policy and in the further-

¹ *R. v. Hardy*, 1794 (Eyre, C.J., Hotham, B., and Grose, J., *pro*; Macdonald, C.B., and Buller, J., *con.*).

² *Gr. Ev.* § 250, in part.

³ *R. v. Hardy*, 1794, as reported 24 How. St. Tr. 816 (Eyre, C.J.).

⁴ *Id.* 808.

⁵ *Att.-Gen. v. Briant*, 1846 (Pollock, C.B.); *R. v. Richardson*, 1863 (Cockburn, C.J.).

⁶ *Home v. Bentinck*, 1820 (Dallas, C.J.); *U. S. v. Moses*, 1827 (Am.).

⁷ *Gr. Ev.* § 252, in part.

ance of justice, the *proceedings of grand jurors* are regarded as privileged. Some imagine that a preliminary inquiry as to the guilt or innocence of a party accused ought to be secretly conducted.¹ At all events every grand jury is sworn to secrecy. One reason of this was to prevent the escape of the party, if he got to know that proceedings were in train against him; another is said to be, to secure freedom of deliberation and opinion among grand jurors. The first reason assigned is now met by the fact, that most crimes are primarily investigated by an open inquiry before the committing magistrate. The second supposed reason rests on an assumption of pusillanimity and meanness, which those who constitute the grand jury but little deserve. A third reason may possibly be to prevent an opportunity of the evidence given before the grand jury being contradicted before the petty jury by subornation of perjury.²

§ 943. The privilege extends not only to the grand jury themselves, but to their clerk,³ if they have one, and to the prosecuting officer,⁴ if present at their deliberations; all these being equally concerned in the administration of the same portion of penal law. On the prosecution of a witness for perjury committed before the grand jury, not only may a mere witness who was there and heard what was said give evidence,⁵ but apparently so may the persons just enumerated. With this exception, however, they are not permitted to disclose what number of jurors were present when a case was brought before them, or the number or names of the jurors who agreed or refused to find the bill of indictment;⁶ neither can they be called on the trial of the original indictment to explain their finding,⁷ or to detail the evidence on which the accusation was

¹ In *R. v. Bullard*, 1872, Byles, J., observed, that "the grand jury were a secret tribunal, and not bound by any rules of evidence."

² See observations on grand juries, in *Law Mag.* vol. xxxi. pp. 242—251.

³ 12 Vin. Abr. Ev. B. a. 5.

⁴ So decided in America, *Com. v. Tilden* (undated) (Am.); *M'Lellan v. Richardson*, 1836 (Am.).

⁵ *Reg. v. Hughes*, 1844.

⁶ *R. v. Marsh*, 1837. See 4 Hawk. P. C. b. 2, c. 25, § 15. In America, grand jurors have been asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact: *M'Lellan v. Richardson*, 1836 (Am.); *Low's case*, 1827 (Am.); *Com. v. Smith*, 1812 (Am.).

⁷ *R. v. Cooke*, 1838 (*Patteson, J.*).

founded,¹ or to show that a witness has given testimony in court contrary to what he had sworn before them.²

§ 944.³ The privilege extends to and excludes the testimony of *traverse* or *petty jurors*, when offered to prove *mistake* or *misbehaviour* by the jury in regard to the verdict.⁴ Accordingly, on a motion to amend the *postea* by increasing the damages, the court refused to admit an affidavit sworn by all the jurymen, in which they stated their intention to have been to give the plaintiff such increased sum.⁵ On several occasions, affidavits that verdicts have been decided by lot have been rejected on motions for new trials, whether such affidavits were sworn by individual jurymen,⁶ or by strangers, stating the subsequent admissions of jurors to the

¹ See *R. v. Watson*, 1817 (Ld. Ellenborough); and *R. v. Marsh*, 1837, arg.; *Hindekoper v. Cotton*, 1834 (Am.); *McLellan v. Richardson*, 1836 (Am.); *Low's case*, 1827 (Am.); *Burr's trial*, about 1807 [Anon.], Ev. for deft. p. 2 (Am.).

² In England, the competency of a grand juror to testify in other than criminal cases as to what a witness said before the grand jury is doubtful. See *Stephen's Evidence*, art. 114. In some of the United States it has, however, been decided to be receivable. See *Greenleaf on Ev.*, 15th edit. (1892), § 252; *Carr v. Mead*, 1858 (Am.); *Jones v. Turpin*, 1871 (Am.); *State v. Wood*, 1873 (Am.); *Stattuck v. State*, 1858 (Am.); *Burdick v. Hunt*, 1873 (Am.). In an action, however, for a malicious indictment, the plaintiff has twice been allowed to call one of the grand jury, in order to prove that the defendant was the prosecutor (*Sykes v. Dunbar*, 1800 (Ld. Kenyon); *Freeman v. Arkell*, 1823 (Park, J.)). As to criminal cases, *Chitty* (1st vol. of *Crim. Law*, p. 322), states that perjury before a grand jury is indictable, and refers to his vol. on *Prec.*, which contains nothing on the subject. *Christian*, also, in a note to 4 Bl. Com. 126, narrates that, at York, a grand juror hearing a witness swear in court contrary to the evidence which he had

given before the grand jury, told the judge, "and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury." What became of this case does not appear. By the N. York Cr. Code, § 267, "Every member of the grand jury must keep secret, whatever he himself, or any other grand juror may have said, or in what manner he, or any other grand juror, may have voted on a matter before them." § 268. "A member of the grand jury may, however, be required by any court to disclose the testimony of a witness examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court; or to disclose the testimony given before them by any person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor." This appears to be the common-sense view of the matter.

³ Gr. Ev. § 252, in part.

⁴ So, also, in America. See *Greenleaf on Ev.*, 15th edit. (1892), § 252 a, and notes; *Woodward v. Leavitt*, 1871 (Am.); *Rowe v. Carney*, 1885 (Am.).

⁵ *Jackson v. Williamson*, 1788.

⁶ *Vasie v. Delaval*, 1785; *Owen v. Warburton*, 1805; *Heyes v. Hindle*, 1863; *Little v. Larrabee*, 1822 (Am.).

deponents,¹ or even stating that a declaration to this effect had been made by one juror in the hearing of his fellows in open court after the verdict had been pronounced²; and, so also in America, has a juryman's affidavit as to alleged conversations passing between him and another juror on their way to or from the court.³ In all cases of this kind, the court must obtain their knowledge of the misconduct complained of, either from the officer who had charge of the jury,⁴ or from some other person who actually witnessed the transaction.⁵ But, although a juryman's affidavit of what occurred in the jury-box during the trial cannot be received, it is admissible to explain the circumstances under which he came into the box.⁶

§ 945. But a similar privilege is not extended to a clerk to the Property Tax Commissioners, who is bound to produce in a court of justice his official books, and to answer all questions respecting the collection of the tax, though sworn, on entering the office, not to disclose anything learnt in that capacity, without the consent of the Commissioners, or unless by force of some Act of Parliament.⁷

§ 946. On principles of public policy again, no witness,—whether a Peer, an M.P., an officer of either House, or a shorthand writer,—can be forced, without the permission of the House having been first obtained, to disclose in a court of justice what took place *within the walls of Parliament*, or to relate any expressions or arguments that may have been used by one of the members in the course of debate.⁸ Although he may probably be asked as to the fact, he may decline to answer any question as to whether or not a member spoke upon a particular subject of discussion,⁹ or as to what he said, or as to the manner in which votes were given on a division.¹⁰

§ 947.¹¹ On grounds of public policy, too, official transactions between the *heads of the departments of Government and their subor-*

¹ *Straker v. Graham*, 1839; *The State v. Freeman*, 1824 (Am.); *Meade v. Smith*, 1844 (Am.).

² *Burgess v. Langley*, 1843; *Raphael v. Bk. of England*, 1855.

³ *Comm. v. White*, 1888 (Am.).

⁴ *Burgess v. Langley*, 1843, as reported 5 M. & Gr. 725 (Cresswell, J.).

⁵ *Vasie v. Delaval*, 1785 (Ld. Mansfield).

⁶ *Bailey v. Macauley*, 1849.

⁷ *Lee v. Birrell*, 1820 (Ld. Ellenborough).

⁸ *Plunkett v. Cobbett*, 1804 (Ld. Ellenborough); *Chubb v. Salomons*, 1852 (Pollock, C.B.).

⁹ *Plunkett v. Cobbett*, 1804.

¹⁰ *Chubb v. Salomons*, 1852.

¹¹ Gr. Ev. § 251, in great part.

dinate officers, are, in general, treated as *secrets of State*.¹ Thus, communications between a colonial governor and his attorney-general, on the condition of the colony or the conduct of its officers,² or between such governor and a military officer under his authority;³ the report of a military commission of inquiry, made to the commander-in-chief;⁴ the report of a collision at sea, made by the captain of one of the ships to the Lords Commissioners of the Admiralty;⁵ the report submitted to the Lord Lieutenant of Ireland by an Inspector General of the prisons;⁶ and the correspondence between an agent of the Government and a Secretary of State;⁷ or between the Directors of the East India Company and the Board of Control, under the old law;⁸ or between an officer of the Customs and the Board of Commissioners;⁹ or dispatches between a Secretary of State for the Colonies and a Colonial Governor;¹⁰ or a report by an officer of Inland Revenue,¹¹ are confidential and privileged matters, the disclosure of which the interests of the State will not permit to be enforced. Until recently, there existed, however, no¹² instance of a document being held protected from production unless it contained a communication made *by* one officer of State to another officer of State in the course of official communication between them on a matter of public business. But the Court of Appeal have recently held¹³ that a communication which it can see is to be one *to* a Government Department is also protected from production as being a State secret if a Minister, or the Head of the Department, sees fit to claim such protection for

¹ *Hennesy v. Wright*, 1888. By the N. York Civ. Code, § 1710, r. 5, "a public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure."

² *Wyatt v. Gore*, 1816.

³ *Cooke v. Maxwell*, 1817.

⁴ *Home v. Bentinck*, 1820; *Beatson v. Skene*, 1860; *Dawkins v. Ld. Rokeby*, 1873.

⁵ *H.M.S. Bellerophon*, 1874.

⁶ *M'Elveney v. Connellan*, 1864 (Ir.).

⁷ *Anderson v. Hamilton*, 1816; *Cooke v. Maxwell*, 1817 (Ld. Ellenborough, cited by the Att.-Gen.);

Stace v. Griffith, 1869; *Marbury v. Madison*, 1803 (Am.).

⁸ *Smith v. E. India Co.*, 1841; *Rajah of Coorg v. East India Co.*, 1856; *Wadeer v. E. India Co.*, 1856.

⁹ *Black v. Holmes*, 1822 (Ir.).

¹⁰ *Hennessey v. Wright*, 1888.

¹¹ *Hughes v. Vargas*, 1893, C. A.

¹² *Blake v. Pilford*, 1832 (Taunton, J.), is not an authority that such a document is *not* privileged, but is properly explicable according to the C. A. on the ground mentioned below.

¹³ *Latter v. Goolden*, 10th Nov. 1894, C. A.; unreported, but in which the editor was counsel.

it, and this even though he gives reasons for the claim which are founded on grounds of convenience rather than of State policy. According to the Court of Appeal,¹ the minister to whose department a document belongs, or the head of a department in whose custody it is, is the exclusive judge as to whether such document is or is not protected from production on grounds of State policy, and if he claims such protection the court will not go behind the claim, or inquire whether the document be or be not one which can properly be the subject of such a claim. Notwithstanding these decisions it may, however, be² that if a minister or head of a department, instead of attending at the trial personally, sent the required papers by the hands of a *subordinate* officer, the judge would examine them himself and compel their production, unless he were satisfied that they ought, on public grounds, to be withheld.

§ 947A. In America the President of the United States, and the Governors of the several States, are not bound to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient.³ And the same doctrine, as it would seem, prevails in England, whenever ministers of State are called as witnesses for the purpose of producing public documents.⁴

§ 948. When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.⁵ In an action of trespass against the governor of a colony, a military officer under his con-

¹ Namely, *Hughes v. Vargas*, 1893, C. A., ubi supra, and *Latter v. Goolden*, 10th Nov. 1894, C. A., ubi supra. In *Latter v. Goolden* the protection was successfully claimed by the head of the department for a letter containing a character written to the authorities at the Mint, though he only said that it was a confidential document, and that as the Civil Service Commissioners received some 20,000 characters a year, Government would be much inconvenienced if the production of any of them could be enforced in a Court of Law, and did not allege that public policy (as such) would be

in any way affected by the production of the particular document.

² As suggested in *Beatson v. Skene*, 1860. See, also, *Dickson v. Earl of Wilton*, 1859 (Ld. Campbell), discussed in *Dawkins v. Ld. Rokeby*, 1873.

³ 1 Burr's trial, about 1807 (Am.) (Marshall, C.J.); *Gray v. Pentland*, 1815 (Am.).

⁴ *Beatson v. Skene*, 1860.

⁵ *Gray v. Pentland*, 1815 (Am.) (Tilghman, C.J.), cited with approbation in *Yoter v. Sanno*, 1837 (Am.) (Gibson, C.J.). See, also, *Stace v. Griffith*, 1869; and ante, § 918.

trol may, however, be asked in general terms, whether he did not act by the direction of the defendant, though the written instructions cannot be given in evidence.¹

§ 948A. The objection that a document is protected from production as being a "State document" cannot, however, be given effect to unless it be taken by the proper officer of the Government himself (*i.e.*, a minister or head of a department), who may not have counsel to argue in support of his objection. The claim that a document is protected as a State document is not available to either of the parties to the action.²

§ 949.³ There is a *fifth* kind of evidence which the law excludes, on public grounds, namely, that which involves the *unnecessary* disclosure of matter that is *indecent*, or offensive to public morals, or *injurious to the feelings of third persons*. A disclosure is for this purpose "unnecessary" whenever the parties themselves have no interest in the matter, except what they have impertinently created. The mere indecency of disclosures will not exclude them, where the evidence is *necessary* for the purpose of civil or criminal justice; as, on an indictment for a rape; or on a question upon the sex of one claiming an estate tail, as heir male or female; or upon the legitimacy of one claiming as lawful heir; or on a petition for dissolution of marriage, for judicial separation, or for damages on the ground of adultery.⁴ But where the parties have impertinently interested themselves in a question, tending to violate the peace of society by exhibiting an innocent third person in a ridiculous light, or to disturb his peace and comfort, or to offend public decency by the disclosures which its decision may require, the evidence will not be received. Of this sort are wagers⁵ or contracts respecting the sex of a third person,⁶ or upon the question whether an unmarried woman has had a child.⁷

¹ *Cooke v. Maxwell*, 1817 (Bayley, J.).

² *Blake v. Pilfold*, 1832 (Taunton, J.), as explained by C. A. in *Latter v. Goolden*, 1894, *supra*.

³ Gr. Ev. § 253, almost verbatim.

⁴ See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), §§ 16, 27, 33.

⁵ No wager is now recoverable, 8 & 9 V. c. 109 ("The Gaming Act, 1845"), § 18; 55 V. c. 4 ("The

Betting and Loans (Infants) Act, 1892). See *Higginson v. Simpson*, 1877; *Diggle v. Higgs*, 1877; *Hampden v. Walsh*, 1876; *Read v. Anderson*, 1884, C. A.; *Trimble v. Hill*, 1879, P. C.

⁶ *Da Costa v. Jones*, 1778.

⁷ *Ditchburn v. Goldsmith*, 1815. If the subject of the action is frivolous, or the question impertinent, and this is apparent on the record, the court will not proceed at all in

§ 950. In like manner, when the legitimacy of a child born in wedlock is the question in dispute, the testimony of the parents, that they have or have not *had connexion*, has,—on the same grounds of decency, morality, and policy,—until recent times, been uniformly rejected by the judges.¹ This rule has not² been superseded,³ and it excludes not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause;⁴ and it applies to the depositions of the parents equally with their *vivâ voce* testimony.⁵ Neither is it affected by the circumstance, that, at the time of the examination of one of the parents, the other is dead; because the rule has been established on the broad basis of general public policy.⁶ But it does not exclude statements by its deceased mother that a child is a bastard.⁷ Nor does it preclude the parents from proving that their supposed marriage was either invalid,⁸ or valid,⁹ or that their children were born before or after its celebration, though the effect of such evidence is, in the first and third cases, to bastardize the issue, and, in the others, to establish its legitimacy.¹⁰ For this purpose, too, their declarations or their old answers in Chancery are admissible evidence.¹¹ On the other hand, a father cannot be heard to contradict his own admissions of access.¹²

the trial. *Brown v. Leeson*, 1792; *Henkin v. Gerss*, 1810. But see *Hussey v. Crickett*, 1811.

¹ *Goodright v. Moss*, 1777; *Legge v. Edmonds*, 1855; *Cope v. Cope*, 1833 (*Alderson, B.*); *Wright v. Holdgate*, 1850 (*Cresswell, J.*); *R. v. Luffe*, 1807; *R. v. Rook*, 1752; *R. v. Reading*, 1734; *R. v. Mansfield*, 1841; *Anon. v. Anon.*, 1856; *Com. v. Shepherd*, 1814 (*Am.*). See ante, § 649.

² In *re Walker*, In *re Jackson*, 1885, following *Guardians of Nottingham v. Tomkinson*, 1879; followed *Burnaby v. Baillie*, 1889. See, also, *Aylesford Peerage case*, 1885, *H. L.*

³ By either 32 & 33 V. c. 68 (cited post, § 1355), or by two modern decisions, which were at one time supposed to have this effect, namely, In *re Rideout's Trusts*, 1870; *Re Yearwood's Trusts*, 1877 (*Hall, V.-C.*).

⁴ *Wright v. Holdgate*, 1850; *R. v.*

Sourton, 1836, where, to prove non-access, the father was asked whether, at a particular time, he did not live with her sister 100 miles away from his wife; it was held that this question could not be put.

⁵ *Goodright v. Moss*, 1777 (*Ld. Mansfield*); *Cope v. Cope*, 1853 (*Alderson, B.*); *Atchley v. Sprigg*, 1864; *Re R——'s Trusts*, 1870 (*Kindersley, V.-C.*), explaining *Plowes v. Bossey*, 1862; *Inglis v. Inglis and Allen*, 1867.

⁶ *R. v. Kea*, 1809.

⁷ *Ulverstone Union v. Park*, 1889. See, also, *Bunsby v. Baillie*, 1889.

⁸ In *re Darcys*, 1860 (*Ir.*).

⁹ *R. v. Bramley*, 1795; *Standen v. Standen*, 1791.

¹⁰ *Goodright v. Moss*, 1777, and the cases referred to in *Ld. Mansfield's* judgment.

¹¹ *Id.*

¹² The *Aylesford Peerage case*, 1885, *H. L.*

§ 951. In a bastardy case, too, a married woman may, when the fact of her husband's non-access has already been proved by independent evidence, confess her adulterous connexion with another person, and thus enable the justices, in the event of her testimony being corroborated in some material particular,¹ to make the order of maintenance.² But this exception to the general rule of exclusion is founded on necessity; since the fact, to which she is permitted to testify, is probably within her own knowledge and that of the adulterer alone.³ Moreover, in an action against a husband for necessities supplied to his wife while living alone, the wife is an admissible witness for the defendant to prove that she has committed adultery, and that, consequently, he is not responsible for her maintenance.⁴ Such evidence is strictly legal, however open to comment, not only as coming from a polluted source, but as the possible result of collusion between the husband and the wife for the purpose of defeating the plaintiff's claim.⁵

¹ 35 & 36 V. c. 65 ("The Bastardy Laws Amendment Act, 1872"), § 4; 36 V. c. 9 ("The Bastardy Laws Amendment Act, 1873"), § 5; 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.

² *R. v. Reading*, 1734; *Cope v. Cope*, 1853; *Legge v. Edmonds*, 1855.

³ *R. v. Luffe*, 1807 (*Ld. Ellenborough*).

⁴ *Cooper v. Lloyd*, 1859.

⁵ *Id.* (*Willes, J.*).

AMERICAN NOTES.

Privileged Matters. — As stated in the text (§ 908), the policy of the law refuses to compel, and frequently even to permit evidence of certain facts to be given, by persons standing in certain relationships to the source of information of the facts in question.

MARITAL CONFIDENCE. — Among the facts excluded are confidential communications between husband and wife made during coverture. *Chicago, &c., R. R. v. Ellis*, 52 Kans. 41 (1893); *Phenix, &c., Ins. Co. v. Shoemaker* (Tenn.), 31 S. W. 270 (1895).

Neither party can be compelled to testify to such communications. If a husband, however, makes a voluntary disclosure, he can be compelled to make it full and complete. *State v. Turner*, 39 S. C. 414 (1892).

A prosecutor cannot be asked, on cross-examination, whether he did not tell his wife that the prisoner acted in self-defence, as being "what the law considers a confidential communication, and which he was not bound to disclose." *Murphy v. Com.*, 23 Gratt. 960 (1873); and frequently the courts have refused to permit such evidence to be given. *Jenne v. Marble*, 37 Mich. 319, 322 (1877); *Moore v. Wingate*, 53 Mo. 398, 408 (1873).

In an action for assault and battery private communications between the defendant and his wife are not competent, unless shown to be so for special reasons. *Mechelke v. Bramer*, 59 Wis. 57 (1883).

A husband in an action for divorce cannot "testify as to any facts derived by him from the confidential relation of husband and wife." *Castello v. Castello*, 41 Ga. 613 (1871).

"Privileged communications" are not limited to verbal statements of a husband or wife. The exclusion extends to acts done in presence of the other at private and confidential interviews. *Perry v. Randall*, 83 Ind. 143 (1882). Husband and wife can testify to offences against each other. *Bramlette v. State*, 21 Tex. App. 611 (1886). Husband and wife cannot testify that a certain transfer of money from one to the other was a loan, for that implies a promise to pay, which cannot be proved by a private conversation between the parties. *Brown v. Wood*, 121 Mass. 137 (1876). The testimony of one to whom the married couple admitted the fact of a loan "was even more objectionable." *Ibid.*

The rule extends even to the fact that in the confidential intercourse of husband and wife a certain statement was *not* made. "What transpired between her and her husband, (whether positively by way of communication, or negatively by way of silence,) in the privacy and confidence of the marriage relation, is sacred." *Goodrum v. State*, 60 Ga. 509 (1878).

Letters between husband and wife, including the envelopes and the evidence furnishable by postmarks, addresses, &c., are privileged. *Selden v. State*, 74 Wis. 271 (1889).

The prohibition extends to facts learned from the other party in the intimacy of married life. "It is . . . admitted in all the cases, that the wife is not competent . . . to disclose that which she has learned from him in their confidential intercourse." *Stein v. Bowman*, 13 Pet. 209, 222 (1839).

Not all private communications between husband and wife are excluded. The rule applies merely to those which are made under the seal of marital confidence. For example, a communication between husband and wife relating to the affairs of an estate of which they are joint trustees is not privileged. *Wood v. Chetwood*, 27 N. J. Eq. 311 (1876).

So of other business communications between husband and wife. *Southwick v. Southwick*, 9 Abb. (N. Y.), Prac. n. s. 109 (1870).

The prohibition applies after the married couple have been divorced. *Perry v. Randall*, 83 Ind. 143 (1882); *Cröse v. Rutledge*, 81 Ill. 266 (1876); *Cook v. Grange*, 18 Ohio, 526 (1849); *Buckingham v. Roar*, 45 Neb. 244 (1895).

And even after one of them has died. "A widow, though competent as a witness, cannot be allowed to testify as to confidential conversations from her husband. This sort of testimony is excluded on the ground of public policy." *Spradling v. Conway*, 51 Mo. 51 (1872).

"Communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets. And the protection which the law holds over the dead, is the very source of greatest security to all the living." *Lingo v. State*, 29 Ga. 470, 483 (1859); *Walker v. Sanborn*, 46 Me. 470 (1859); *Pillow v. Thomas*, 1 Baxter (Tenn.), 120, 129 (1873).

A qualification, not perhaps sufficiently observed in *Lingo v. State* (*ubi supra*), is that the excluded fact must have been learned in a confidential way from the other party. Where a widow had learned a fact, simply because she chanced to be present, she may testify to it. *Walker v. Sanborn*, 46 Me. 470 (1859); *Litchfield v. Merritt*, 102 Mass. 520 (1869); *Griffin v. Smith*, 45 Ind. 366 (1873).

The statutes allowing husband and wife to testify for or against each other have not modified the rule as to confidential communications. *Robinson v. Chadwick*, 22 Oh. St. 527 (1872); *Keator v. Dimmick*, 46 Barb. 158 (1865).

LIMITATIONS OF THE RULE. — The rule does not proceed upon

any idea that the private communications between married people are peculiarly sacred *per se*. It is based upon an apprehension of the consequences liable to follow if either of the parties could testify to such communications. No privilege inheres in the subject-matter.

A confidential communication to a woman who erroneously supposed she was married to the speaker is not privileged. *Cole v. Cole*, 153 Ill. 585 (1894).

If an eavesdropper overhears such a communication he can testify to it, if relevant. "There is no rule of law," say the supreme judicial court of Massachusetts, "requiring that third persons who hear a private conversation between husband and wife shall be restrained from introducing it in their testimony." *Com. v. Griffin*, 110 Mass. 181 (1872); *State v. Center*, 35 Vt. 378 (1862).

Where a third person is present at a conversation between husband and wife, such person can state the conversation. *Allison v. Barrow*, 3 Cold. 414 (1866); *Gannon v. People*, 127 Ill. 507 (1889); *State v. Gray*, 55 Kans. 135 (1895).

The presence of young children of a family, taking no part in and paying no attention to a conversation in their presence between husband and wife, does not prevent the conversation from being private. *Jacobs v. Hesler*, 113 Mass. 157 (1873).

For the same reasons, the presence of a daughter fourteen years old at a conversation between her parents, in which she naturally would take an interest, makes the conversation competent. *Lyon v. Prouty*, 154 Mass. 488 (1891).

It is within the reasoning on which the rule is founded, that where a private letter from a husband to his wife fell into the possession of a third person, not agent or representative of husband or wife, the latter may produce it in evidence. *State v. Hoyt*, 47 Conn. 518, 540 (1880); *State v. Buffington*, 20 Kans. 599, 613 (1878).

Where a wife turns over to a paramour a confidential letter from her husband, the paper is still privileged. "We are aware that there are respectable authorities holding that a privileged oral communication may be given in evidence by one who overheard it, though an eavesdropper; or that a privileged written communication, purloined from the proper custodian of it, may be received in evidence. In such instances, however, the parties to the privileged communication do not themselves successfully make and keep it private; but where this result is accomplished, the law will not permit either of the parties, directly or indirectly, to violate the confidence of the other. In respect to documents, there is a difference between those which are confidential in their own nature, such as letters between husband and wife, and those which become confidential by custody, such as papers deposited by

a client with his attorney. The law, for reasons of its own, desires that all communications between husband and wife shall be absolutely free and untrammelled, and that each may say or write whatsoever he or she pleases to the other, with the absolute assurance that the one receiving the communication will neither be compelled nor permitted to disclose it. We therefore think it the wiser and better course to adhere strictly to the declared policy of our law, and to hold that this letter was properly rejected, however important it may be in the determination of this case." *Wilkerson v. State*, 91 Ga. 729, 738 (1893).

To the contrary effect is *People v. Hayes*, 70 Hun, 111 (1893). "A letter, also, written confidentially by husband to wife is admissible against the husband when brought into court by a third party." *Ibid.*

The same rule is prescribed by statute in certain states. Pub. Stats. Mass. Chap. 169, § 18, cl. 1. *Com. v. Cleary*, 152 Mass. 491 (1890).

COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT. — Upon necessary grounds of public policy for furthering the adequate administration of justice, the intercourse between attorney and client is privileged from disclosure on the witness stand. An attorney is forbidden to testify as to such facts as he may learn from his client by virtue of his professional relation. *Chirac v. Reinicker*, 11 Wheat. 280 (1826); *Sargent v. Hampden*, 38 Me. 581 (1854); *Huster v. Davis*, 3 Yeates, 4 (1800); *Maxham v. Place*, 46 Vt. 434 (1874); *Jenkinson v. State*, 5 Blackf., 465 (1840); *Forsyth v. Charlebois*, 12 L. C. Jur. 264 (1868); *Parker v. Carter*, 4 Munf. 273, 286 (1814); *State v. Sterrett*, 68 Ia. 76 (1885); *Bondy v. Valois*, 15 Rev. Lég. 63 (1887); *Chew v. Farmers' Bank*, 2 Md. Chan. 231 (1848); *Erickson v. R. R. Co.*, 93 Mich. 414 (1892); *State v. Calhoun*, 50 Kans. 523 (1893); *Austin v. Heiser*, (S. Dak.) 61 N. W. 445 (1894).

The element of confidence is one essential to the existence of the privilege. *Howard v. Copley*, 10 La. Ann. 504, 505 (1855). Therefore communications by an attorney by one having only a nominal interest in a case are not privileged. *Adams v. Harrison*, 30 Vt. 219 (1858).

The rule applies to all cases where legal advice is sought. It is not necessary that the advice should relate to a suit in court. *Borum v. Fouts*, 15 Ind. 50 (1860).

"On the whole we are of opinion, that although this rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly, yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the

purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defect of title, by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes, not connected with a suit in court." *Foster v. Hall*, 12 Pick. 89 (1831).

But it is necessary that the attorney should be acting in his paid professional capacity. Where he is acting to oblige a neighbor with no retainer or expectation of payment, the communications are not privileged. *Coon v. Swan*, 30 Vt. 6 (1856). "The communications must have been of a confidential and professional character, to bring them within the reason of the rule." *Ibid.* *Rudd v. Frank*, 17 Ont. 758 (1889); *Patten v. Glover*, 1 App. D. C. 466 (1893).

The actual payment of a retainer is, however, not essential. *Orton v. McCord*, 33 Wis. 205 (1873); *Cross v. Riggins*, 50 Mo. 335 (1872); *Mowell v. Van Buren*, 77 Hun, 569 (1894).

To the contrary effect, see *De Wolf v. Strader*, 26 Ill. 225 (1861).

Where an attorney is acting for both parties, no privilege exists. *Sparks v. Sparks*, 51 Kan. 195 (1893); *Goodwin, &c., Co.'s Appeal*, 117 Pa. St. 514, 537 (1888); *Hebbard v. Haughian*, 70 N. Y. 54 (1877). As where acting for two parties against a third, he is asked to testify in a suit between his two original clients. *Rice v. Rice*, 14 B. Monr. 417 (1854).

Or where an attorney acts as referee for both parties. *Cady v. Walker*, 62 Mich. 157 (1886). "Neither made, or was expected to make, any communication which was to be concealed from the other." *Ibid.*

The rule is the same, though the original consultation was by one of the parties as to a deed from himself for the benefit of the other. *Gulick v. Gulick*, 38 N. J. Eq. 402 (1884).

"Where several persons employ the same attorney in the same business, communications made by them in relation to such business, while privileged as to their common adversary, are not privileged *inter sese*." *Seip's Estate*. *Probst's Appeal*. 163 Pa. St. 423 (1894).

"Where both parties are present the general rule cannot apply, for the element which gives vitality to the rule does not exist. The authorities are abundant and harmonious upon this question, for it is agreed on every hand that communications made to one who is acting for both parties are competent and cannot be considered as privileged." *Hanlon v. Doherty*, 109 Ind. 37 (1886); *Britton v. Lorenz*, 45 N. Y. 51 (1871).

The rule extends to documents intrusted by a client to his attorney. "The prisoner has the privilege to prevent the disclosure of communications which he may have made to his counsel in the course of professional employment; and if papers have, under such circumstances, been placed by the former in the possession of the latter, they are considered as privileged. It is true, that the counsel may be permitted to give evidence of such matters, connected with the transaction, when his knowledge is derived *abunde*; but the line of distinction must not be lost sight of, in admitting the evidence before the jury." *State v. Hazleton*, 15 La. Ann. 72 (1860); *Crosby v. Berger*, 11 Paige, 377 (1844); *Freeman v. Brewster*, 93 Ga. 648 (1894).

And to an answer in a Chancery suit which has not been filed. *Neal v. Patten*, 47 Ga. 73 (1872).

An attorney cannot be asked in what condition one of his client's papers was at a certain time. *Dietrich v. Mitchell*, 43 Ill. 40 (1867); *Brown v. Payson*, 6 N. H. 443 (1833); *Coveney v. Tannahill*, 1 Hill, 33 (1841); *Matthews v. Hoagland*, 48 N. J. Eq. 455 (1891); *Arbuckle v. Templeton*, 65 Vt. 205 (1892).

But see to a contrary effect, *Turner v. Warren*, 160 Pa. St. 336 (1894).

Confidential letters between attorney and client relating to legal business are privileged. *Higbee v. Dresser*, 103 Mass. 523 (1870); *Ebersole v. Rankin*, 102 Mo. 488 (1890); *Nelson v. Becker*, 32 Neb. 99 (1891).

Where A. writes to the attorney of his opponent B., on a professional subject, supposing him to be open to a retainer, B. cannot use the letters against A. *Nelson v. Becker*, 32 Neb. 99 (1891). But where a legatee asks the lawyer of the testator to use his influence with the testator for the legatee the communication is not privileged, even if the legatee has previously employed the attorney in some small matters. *Turner's Estate*, 167 Pa. St. 609 (1895).

In other words, the communications to be privileged must be *confidential*. Where a non-resident debtor sent a proposition of compromise to his creditors through a resident solicitor, it was held that the letter was not privileged. "Communications of such a character, made for such a purpose, and so dealt with, cannot, without manifest confusion, be termed confidential." *Fraser v. Sutherland*, 2 Grant's Chan. 442 (1851).

For similar reasons, no privilege attaches to a communication made by a client to the attorney of his adversary. There is no confidence. If there is, it is misplaced. *Hall v. Rixey*, 84 Va. 790 (1888); *Tucker v. Finch*, 66 Wis. 17 (1886).

And so where the communication is made to an attorney with directions to repeat it, as a messenger. "The statement, if made,

was not intended to be confidential." *Ferguson v. McBean*, 91 Cal. 63 (1891); *State v. Hedgepath*, 125 Mo. 14 (1894); *Collins v. Robinson*, 72 Hun, 495 (1893).

Or with directions to repeat it to the adverse party. "It was not a communication made to the attorney for the purpose of securing from him professional aid or advice." *Henderson v. Terry*, 62 Tex. 281 (1884).

A conversation between a client, his attorney, and his creditors is not privileged. *Houx v. Blum* (Tex.), 29 S. W. 1135 (1895).

And an attorney may testify to conversations made before the relation of attorney and client arose. *Jennings v. Sturdevant* (Ind.), 40 N. E. 61 (1895).

The privilege, moreover, applies only to legitimate professional business. It does not extend to communications made by the client to the attorney before the commission of a crime, and for the purpose of being guided or helped in its commission. *Orman v. State*, 22 Tex. App. 604, 616 (1886); *Matthews v. Hoagland*, 43 N. J. Eq. 455 (1891); *Hickman v. Green*, 22 S. W. 455 (Mo. Rep.) (1893).

The application to an attorney for advice to enable one to forge a contract is not privileged. *People v. Blakeley*, 4 Parker Cr. Rep. 176 (1859); *State v. Kidd*, 89 Ia. 54 (1893). So as to a scheme of fraud. *State v. Cadwell*, 16 Mont. 119 (1895).

But professional advice on the same day as a murder is privileged, if not calculated to aid in the perpetration of the crime. *Graham v. People*, 63 Barb. 468 (1872).

Communications made to an attorney for the purpose of making a conveyance said to be in fraud of the client's creditors are still privileged. *Hollenback v. Todd*, 119 Ill. 543 (1886). "So far from presenting a case entitling him to use the testimony of the attorney, it certainly presents a strong one to induce the court to exclude it; for the more plainly the witness makes the fraud appear, the greater, we must suppose, was the confidence reposed by the client, and his reliance upon the law to protect him against an abuse of the confidence, or the bad faith of the attorney." *Parkhurst v. McGraw*, 24 Miss. 134 (1852); *Hamil v. England*, 50 Mo. App. 338 (1892).

But communications by a client to his attorney of an intent to violate the insolvency law by permitting certain creditors to obtain preferences are not privileged. *Taylor v. Evans* (Tex.), 29 S. W. 172 (1894).

The privilege applies "to any words spoken, or any acts done, by the client . . . in the presence of his attorney and in the course of his employment." *Kaut v. Kessler*, 114 Pa. St. 603 (1886).

If a privileged question has been answered by an attorney, in ignorance of his relation to the fact, his answer may be stricken

out, on motion, when the fact of his professional character is developed later. "It would be too strict to hold that a party is bound to interrupt the examination of a witness in respect to a material matter on a mere suspicion that the witness may be debarred by his position from testifying. He may, we think, await his opportunity on cross-examination to bring out the facts, and, if on such examination it appears that the witness is incompetent, make his motion to have the testimony expunged from the record." *Loveridge v. Hill*, 96 N. Y. 222 (1884).

The rule has been so far extended as to embrace cases where a statement is made to an attorney in his professional capacity by one who has not employed him.

Thus, where the interests of A. were involved in a suit brought against his partner, B. (though he is not nominally a party to the record), A's declarations to B's lawyer, relating to the case, may be excluded as privileged. *Orton v. McCord*, 33 Wis. 205 (1873).

Where several persons, jointly indicted, were engaged in conference, attended by their respective counsel, none of the counsel present will be permitted to testify as to what was said. "Nothing can be more certain than that, according to all the authorities on the subject, whatever either of the counsel present heard, or saw, on the said occasion, concerning the matter of the said charge, was a privileged communication, within the meaning of the rule." *Chahoon v. Com.*, 21 Gratt. 822 (1871).

WHO ARE LEGAL ADVISERS. — A conveyancer is not necessarily a legal adviser, and in cases where he acts merely as an abstractor of title, no privilege attaches to statements made to him. *Stallings v. Hullum*, 79 Tex. 421 (1891); *Sparks v. Sparks*, 51 Kans. 195 (1893).

The rule is the same where an attorney is *pro hac vice* acting as a scrivener. "The fact that . . . had been the legal adviser of the appellant, generally, and that he was paid by him for his services in the writing of these papers, will not be allowed to affect the nature of the act done, it being otherwise clear from the proof that he was acting as a scrivener only." *Thomas v. Griffin*, 1 Ind. App. 457 (1890); *Hanlon v. Doherty*, 109 Ind. 37 (1886); *Toms v. Beebe*, 90 Ia. 612 (1894); *Childs v. Merrill*, 66 Vt. 302 (1894); *Caldwell v. Davis*, 10 Colo. 481, 492 (1887); *Randal v. Yates*, 48 Miss. 685 (1873); *Hebbard v. Haughian*, 70 N. Y. 54 (1877); *Childs v. Merrill*, 66 Vt. 302 (1894); *Van Alstyne v. Smith*, 82 Hun, 382 (1894).

The rule is the same where an attorney simply takes an acknowledgment as a notary public, *Houx v. Blum* (Tex.), 29 S. W. 1135 (1895); *Aultman v. Daggs*, 50 Mo. App. 280 (1892).

But where the attorney is consulted as such the fact that the consultations result in the execution of a deed does not alter the rule. *Rogers v. Lyon*, 64 Barb. 373 (1872).

And the privilege extends to an attorney in drawing a will. *Gurley v Park*, 135 Ind. 440 (1893).

"Conversation between the parties to a mortgage in the hearing of an attorney employed to draft the mortgage, not embracing any communications made to him as an attorney or for the purpose of obtaining his advice or legal opinion, is not privileged." *Hanson v. Bean*, 51 Minn. 546 (1892).

Communications made to one who is studying law in a lawyer's office, and obtained in that capacity, are not privileged. "An attorney is not permitted to disclose as a witness, the secrets of his client, because in doing so, he would betray a confidence, which from necessity the client must repose in him. All the reasons which apply to the attorney, apply to an interpreter between the client and the attorney, of whom he is merely the organ. Not one of these reasons apply to the student; no confidence is reposed in him by the client, nor is there any necessity that it should. The Court feels no inclination to extend the rule further than it has already gone." *Andrews v. Solomon*, Pet. C. C. 356 (1816); *Barnes v. Harris*, 7 Cush. 576 (1851). "We believe the rule is correctly stated in *Foster v. Hall*, 12 Pick. 93; *viz.*, that it 'is confined strictly to communications to members of the legal profession, as barristers and counsellors, attorneys and solicitors, and those whose intervention is necessary to secure and facilitate the communication between attorney and client; as interpreters, agents, and attorneys' clerks.'" *Barnes v. Harris*, 7 Cush. 576 (1851).

It is necessary that the attorney should have been admitted to the bar. If a law student is employed to do the work of an attorney, communications to him by a client are not privileged. As the supreme court of Pennsylvania rather unfeelingly say, "A law student is, in this respect, on no higher plane than a blacksmith retained in a like service." *Schubkagel v. Dierstein*, 131 Pa. St. 46 (1889). "Communications relating to the subject matter of a suit, made by one of the parties thereto, to a person supposed to be an attorney at law, and with a view to engage him professionally in said suit, when such person was not an attorney of any court, but was receiving business as one, and was expecting to be, and was, admitted to practice, at the next term of the District Court, are not privileged." *Sample v. Frost*, 10 Ia. 266 (1859).

On the contrary, in Ohio, communications to one who for years had pursued the calling of a legal practitioner in the lower courts, but without being admitted to the bar, have been held privileged. "There was present every element which would invoke the application of the general rule upon this subject except the mere form of the admission of the adviser to practice in courts of record. Every consideration of reason, justice, logic, and fair-play would seem to demand that the mere artificial distinction

which the state calls upon us to enforce should be made to yield to the modern tendency to apply the reason and spirit of the rule instead of adhering rigidly and sullenly to its letter." *Benedict v. State*, 44 Oh. St. 679, 689 (1887).

COLLATERAL FACTS. — The acts of attorney and client may be fully proved in any case where they are material. *Perry v. State* (Idaho), 38 Pac. 655 (1894).

The mere fact of the existence of the relation of attorney and client can be stated. *Chirac v. Reinicker*, 11 Wheat. 280 (1826). And an attorney can testify as to who employed him. *Beamer v. Darling*, 4 Q. B. U. C. 249 (1848).

So the attorney may state the result of his observation, *e. g.*, that his client seemed satisfied with a substituted security. *Heister v. Davis*, 3 Yeates, 4 (1800).

Or altered a document in his presence, even if his only reason for being present, and, consequently, able to observe, was his professional retainer. *Patten v. Moor*, 29 N. H. 163 (1854).

An attorney may be compelled to testify that he wrote a certain letter for the defendant, alleged to be libellous. *Ethier v. Homier*, 28 Lower Can. Jur. 83 (1873).

Or what took place in open court, *e. g.*, what claim of title was made by his client in a certain case in which he acted as her counsel. *Levers v. Van Buskirk*, 4 Pa. St. 309 (1846).

In general, facts which an attorney knows from a source other than confidential communications from his client are not privileged. "The rule is well settled that an attorney will not be compelled, or even allowed, against the objection of the client, to disclose anything communicated by his client to him in his professional capacity, and the reason on which the rule rests is that it is in the interest of justice that the most full, free and complete communication should take place between attorney and client. It is not, however, in the interest of justice to extend this privilege so that by its operation the truth in relation to facts otherwise in the knowledge of an attorney be suppressed." *Swan v. Humphreys*, 42 Ill. App. 370 (1891).

An attorney can state whether he took a certain deed in settlement of a claim or a mortgage. *Caldwell v. Melvedt* (Ia.), 61 N. W. 1091 (1895).

LIMITATIONS OF THE RULE. — The prohibition, like that relating to confidential communications between husband and wife is a perpetual one. *Parker v. Carter*, 4 Munf. 273, 286 (1814). A communication made after the relation of attorney and client has ended may be stated, though similar to statements made during the continuance of the relationship. *Brady v. State*, 39 Neb. 529 (1894).

An attorney who has learned facts from his client, in a profes-

sional capacity, cannot state them, though the difficulties have not, as yet, developed into litigation. *Riley v. Johnston*, 13 Ga. 260, 268 (1853).

Merely as such, an attorney is entitled to no particular privilege. When he is a party he can be compelled to testify as any other witness. *Ethier v. Homier*, 28 Lower Can. Jur. 83 (1873).

An attorney who learns from others facts relating to a case, even during his active connection with the case, may be compelled to state them. *Crosby v. Berger*, 11 Paige, 377 (1844). "The privilege only extends to information derived from his client, as such; either by oral communications, or from books or papers shown to him by his client, or placed in his hands in his character of attorney or counsel. Information derived from other persons, or other sources, although such information is derived or obtained while acting as attorney or counsel, is not privileged." *Crosby v. Berger*, 10 N. Y. 377 (1844). *Buckmaster v. Kelley*, 15 Fla. 180 (1875); *Chew v. Farmers' Bank*, 2 Md. Chan. 231 (1848).

Where an attorney made memoranda of a settlement of litigation, in which his client was concerned at an interview where all parties were present, such memoranda are not privileged. *Deuser v. Hamilton*, 52 Mo. App. 394 (1892).

For similar reasons, communications to an attorney not relating to the subject-matter of the consultation are not privileged. For example, where a defendant, during a consultation with his counsel, uttered threats against the deceased. Such a communication must be stated by an attorney. "It cannot be claimed, even, that the intention expressed by the threats was a matter submitted to the attorneys professionally. Their advice and aid were not sought in regard to it. The defendant's enmity, spirit of revenge, or other motive, whatever it may have been, which prompted the threats had no connection with the matter involving the rights of defendant submitted to the attorneys. Neither the threats nor the motives of defendant were the subject of professional communication. They cannot therefore be regarded as privileged." *State v. Mewherter*, 46 Ia. 88 (1877).

The privilege applies equally, in favor, both of the attorney and the client. Neither can be compelled to answer. The attorney will not be permitted. *Hemenway v. Smith*, 28 Vt. 701 (1856); *State v. White*, 19 Kans. 445 (1877); *Carnes v. Platt*, 15 Abb. (N. Y.) Prac. 337 (1873); *Perry v. State* (Idaho), 38 Pac. 655 (1894).

It is not material that the attorney declines to go on with the case which has been unfolded to him, or about which he has been consulted. *Thorp v. Goewey*, 85 Ill. 611 (1877); *Peek v. Boone*, 90 Ga. 767 (1892); *Sargent v. Hampden*, 38 Me. 581 (1854).

"As they were committed to him in his professional character, the spirit of the rule would require that they should not be divulged,

without the assent of the party by whom they were made. The protection justly extends to all communications made to legal advisers with a view to obtain professional aid, and in reference to their employment in legal proceedings pending or contemplated, or in any other legitimate professional services." *Ibid.* *Parker v. Carter*, 4 Munf. 273, 286 (1814). "The present record presents the question whether one who seeks counsel, but who in fact pays no fee, and employs others in the prosecution of the business — the counsel consulted being afterwards employed against him — can be so considered as a client that his communications are privileged. I know not where to draw a distinction. The rule should be universal, and apply to all who communicate facts, excepting professional advice, or it will fail to answer its ends. Its limitations may be unknown to laymen, and without feeling perfect freedom in all cases, instead of the perfect confidence that should exist, the intercourse might be restrained by fear and marred by dissimulation on the part of the client, and the object of the rule be defeated; and besides, a door would be open to fraud. One might seek advice, expecting not only to pay but to retain in an anticipated litigation, and, after his story had been heard, the retainer might be declined and the information be used against him; also an obstacle would be thrown in the way of the settlement of disputes. The noblest office of the lawyer is to heal difficulties, and far more is done in that direction in the higher walks of the profession than is known to the public.

In seeking this end counsel may receive communications from the opposite party, and not made under circumstances that would exclude them as propositions to compromise. The conventionalities that hedge in the English counsellor are unknown in this country, and public policy requires that persons should feel that they may securely say anything to members of the profession in seeking aid in their difficulties, although the person whose advice they seek may have been employed, or may be afterwards employed against him. The term 'client,' then, in the statute, should be used in its most enlarged sense, and the prohibition should close the mouths of all who have listened to disclosures looking to professional aid." *Cross v. Riggins*, 50 Mo. 335 (1872).

Therefore it is immaterial that the relation of attorney and client never became established. *State v. Tally* (Ala.), 15 So. 722 (1894).

WHAT COMMUNICATIONS ARE CONFIDENTIAL. — It is not an absolute rule that no one can be present except the attorney and his client. Both parties may require the assistance of agents without impairing the operation of the rule shielding the professional communication.

That a mother was present at a consultation between her daugh-

ter and a legal adviser as to the matter of the daughter's seduction does not remove the privilege from statements made to the attorney, by the daughter. "It is well established that the privilege extends as well to communications to or through an agent, as to those made directly to the attorney by the client in person, and we think it is only a dictate of decency and propriety to regard the mother in such a case as being present and acting in the character of confidential agent of her daughter." *Bowers v. State*, 29 Oh. St. 542 (1876).

A communication to a lawyer in presence of his clerk is none the less privileged. *Brand v. Brand*, 39 How. (N. Y.), Prac. 193, 260 (1870).

An interpreter cannot be compelled to divulge the statements, of which he is the channel, between attorney and client. *Jackson v. French*, 3 Wend. 337 (1829).

It has even been held that a communication made directly to the lawyer's clerk in the absence of the attorney, concerning a suit begun by the attorney, are privileged. "It is customary for attorneys to intrust their clerks, more or less, with the conduct of suits prior to the trial thereof, and communication with the clients is frequently necessary." *Sibley v. Waffle*, 16 N. Y. 180 (1857); *State v. Sterrett*, 68 Ia. 76 (1885).

But as a general rule, one who is present at the making of a professional communication, can be compelled to divulge it. "The counsel himself cannot disclose a communication made to him by his client relative to a case in which the relation of client and counsel exists; but that privilege is confined to counsel, to an interpreter, and perhaps to the clerks of an attorney or counsel, though as to the latter the cases differ. But if a party makes communications to counsel in presence of persons in no way connected with the counsel, such persons are bound to disclose what they may have heard." *Jackson v. French*, 3 Wend. 337 (1829). "A communication intended to be confidential should not be made in the hearing of a third person; unless that person stood in a peculiar relation of confidence; which was not the case with Macomber. He did not know of the crime and he simply took the defendant to see a lawyer, because his friend was alarmed by the newspaper comments and charges. The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for and are supposed to be confided to the lawyer, to guide him in giving his professional aid and advice. I am not aware of any extension of the rule, which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend." *People v. Buchanan*, 145 N. Y. 1, 26 (1895).

So of a lawyer's son who "had no charge of, or connection with,

his professional business." *Goddard v. Gardner*, 28 Conn. 172 (1859). "The rule also, like the reason of it, extends to interpreters, and to clerks and agents employed by the attorney, etc., in the business committed to his charge, but extends no further. Its operation is to exclude material evidence from the consideration of the triers, and it ought not to be extended beyond the reason on which it rests.

"But, as the protection it affords is the privilege of the client, he may renounce or waive it at his pleasure. No reason of necessity requires that any witness (save an interpreter,) should ever be present at a consultation between the client and his attorney, and if the client procures or submits to the presence of such a witness, he voluntarily confides his secrets, not to his attorney only, but also to the witness, in whose custody the law cannot protect them when the interests of justice require that they should be disclosed." *Goddard v. Gardner*, 28 Conn. 172 (1859).

A statement by a client to his attorney made in the presence of a third party may be stated by the latter. *Basye v. State*, 45 Neb. 261 (1895). But the mere fact that a professional communication is made at a time when a large number of persons are present does not necessarily prevent the communication from being confidential, and so affect the matter of privilege.

So a communication made in a crowded court-room may still be privileged. *Parker v. Carter*, 4 Munf. 273, 286 (1814). "We must not, in relation to a fact of a highly confidential nature, and strictly applying to the question submitted, embark in a field of uncertainty and conjecture, and, without any certain scale to go by, undertake to decide, from the place and manner of the conversation, that this fact was not disclosed in confidence. It is safer, and more conducive to that free intercourse which should exist between a client and his attorney, to consider all communications confidential, which fall within the description just mentioned: unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear them." *Parker v. Carter*, 4 Munf. 273, 287 (1814).

As in case of a confidential communication between husband and wife the prohibition applies not to the communication itself but to the person giving it. Any one present at or who overhears a professional communication may be compelled to state it.

So of a stranger present. *State v. Sterrett*, 68 Ia. 76 (1885); *Bulman v. Andrews*, 12 Rev. Leg. 332 (1883); *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502 (1877); *Basye v. State*, 45 Neb. 261 (1895).

That knowledge of a professional communication was obtained by eavesdropping, or by a casual bystander whom the parties did not know to be within hearing, does not affect the question of

admissibility. "In consequence of a want of proper precaution, the communications between him and his client were overheard by a mere stranger. As the latter stood in no relation of confidence to either of the parties, he was clearly not within the rule of exemption from giving testimony; and he might therefore, when summoned as a witness, be compelled to testify to what he overheard, so far as it was pertinent to the subject matter of inquiry upon the trial; this is all that was allowed by the court." *Hoy v. Morris*, 13 Gray, 519 (1859).

But where a confidential fee contract between an attorney and client came into the hands of a stranger, the latter was not allowed to use it. "To fairly carry out the real purpose of the rule, it must be held that privileged communications are, in and of themselves, incompetent, regardless of the mere manner in which it is sought to put them 'in evidence.'" *Liggett v. Glenn*, 51 Fed. Rep. 381, 396 (1892).

But the fact that a third person can testify to a communication does not enable the attorney himself to do so. "As between the client and attorney they are still confidential, though made in the presence or hearing of a third party. The only effect of that is that they are less confidential in fact, and that such third party may testify to them. It does not qualify the attorney as a witness." *Blount v. Kimpton*, 155 Mass. 378 (1892).

PRIVILEGE IS THE CLIENT'S. — It is for the client, if so disposed, to remove the seal of secrecy from the lips of the attorney. *Sargent v. Hampden*, 38 Me. 581 (1854); *Denver Tramway Co. v. Owens*, 20 Colo. 107 (1894); *Mayo v. Foley*, 40 Cal. 281 (1870); *Tays v. Carr*, 37 Kans. 141 (1887); *Parker v. Carter*, 4 Munf. 273 (1814); *Goddard v. Gardner*, 28 Conn. 172 (1859). When the question is doubtful the court should give the client the benefit of the doubt. *People v. Atkinson*, 40 Cal. 284 (1870).

The client cannot be forced on cross-examination, to disclose the privileged communications. *Bigler v. Reyher*, 43 Ind. 112 (1873); *Tate v. Tate*, 75 Va. 522, 533 (1881).

Where two persons with conflicting interests consult the same attorney, one cannot remove the bar of secrecy as to communications made by the other. Under these circumstances the consent of both is needed. *Hull v. Lyon*, 27 Mo. 570 (1858).

The privilege being that of the client, his opponents cannot object to the evidence. *Smith v. Savings Bank*, 1 Tex. Civ. App. 115 (1892).

"The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client

to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent." *Chirac v. Reinicker*, 11 Wheat. 280 (1826).

"It is not material, whether the evidence relate to what was said by the attorney, or what was said by the client, in their private conversation on the business in which the attorney was professionally employed. The statements of each to the other, in such cases, must be considered as privileged communications; and the attorney should neither be required nor permitted, by any judicial tribunal, to divulge them against his client, if the latter object to the evidence." *Jenkinson v. State*, 5 Blackf. 465 (1840).

Waiver. — This privilege, like most others, the client can waive.

Sending a person to an attorney for information concerning the client's position is a sufficient waiver. *Galle v. Tode*, 74 Hun, 542 (1893).

He is not considered to waive it by voluntarily taking the stand as a witness. *Bigler v. Reyher*, 43 Ind. 112 (1873); *Hemenway v. Smith*, 28 Vt. 701 (1856); *Barker v. Kuhn*, 38 Ia. 392 (1874).

To contrary, see *Tate v. Tate*, 75 Va. 522, 533 (1881), where the matter is part of the witness's case.

In *inhabitants of Woburn v. Henshaw*, 101 Mass. 193 (1869), the court say, "The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client; but if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness. This is true even as to defendants in criminal cases." *Woburn v. Henshaw*, 101 Mass. 193 (1869).

Where the client testifies concerning conversations with his attorney it was suggested in *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502 (1877), that the privilege might be considered waived, at least to that extent.

A testator, by making an attorney an attesting witness in his will, waives the privilege of confidence relating to communications relating to the execution of the will. *McMaster v. Scriven*, 85 Wis. 162 (1893); *Pence v. Waugh*, 135 Ind. 143 (1893).

Merely putting a party's attorney on the stand as a witness does not of itself amount to a waiver of the privilege attaching to professional communications. *Montgomery v. Pickering*, 116 Mass. 227, 231 (1874).

See also to the effect that an attorney put on the stand becomes "a witness in the cause generally," *Gilbert v. Campbell*, 2 New Bruns. 55 (1870).

But where one of two joint defendants turns "state's evidence," and takes the stand to accuse himself and his associates, this amounts to a waiver. "Both client and counsel may in such

case be compelled to disclose such communications." *Jones v. State*, 65 Miss. 179 (1887); *Alderman v. People*, 4 Mich. 414 (1857); *Hamilton v. People*, 29 Mich. 173, 184 (1874).

Even this does not make the attorney of the testifying defendant competent as a witness. *State v. James*, 34 S. C. 49 (1890).

A QUESTION FOR THE COURT. — Whether a communication is privileged is a preliminary question for the court. *Hull v. Lyon*, 27 Mo. 570 (1858). *Goddard v. Gardner*, 28 Conn. 172 (1859); *Childs v. Merrill*, 66 Vt 302 (1894).

Even though the attorney disclaims acting as a professional adviser. *Bacon v. Frisbie*, 80 N. Y. 394 (1880).

"A solicitor generally, and we will add properly, puts himself under the ruling of the court when such occasions arise, declining to answer or to produce, if his own client's interests are affected, unless the court direct or at least sanction or permit it. A contrary course may well be deemed a surprise on the client, and not the less if only a selected portion of the papers is produced." *Livingstone v. Gartshore*, 23 Q. B. U. C. 166 (1863).

Where an attorney was inquired of as to matters which "he did not know but what he got" as an attorney, the court say that the trial court "should have excluded the testimony on its own motion." *People v. Atkinson*, 40 Cal. 284 (1870).

But where the evidence is in conflict, as the existence of a professional relationship, the preliminary action of the court in admitting the evidence may be revised and controlled by the jury, who may be directed to disregard a communication, if under the law as given them, they find the necessary facts exist. "We understand this to be the correct practice, and in many cases to be the only safe rule for determining such questions." *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502 (1877).

The onus is on the party objecting to the evidence of an attorney as privileged, to show that the admission of the client to the attorney sought to be proved was confidential. *Mowell v. Van Buren*, 77 Hun, 569 (1894).

SECRETS OF STATE. — Courtesy to a co-ordinate branch of government and an obvious requirement of public policy that the executive dealings of the sovereign should not be embarrassed by the action of the courts, have established the rule that it is for the executive departments to decide for themselves what facts under their control the public interest permits them to reveal in court. *Gray v. Pentland*, 2 S. & R. 23, 32 (1815); *Hartranft's Appeal*, 85 Pa. St. 433 (1877).

Even the supreme court of the United States disclaims the right to compel executive secrets. "An extravagance, so absurd and excessive, could not have been entertained for a moment." *Marbury v. Madison*, 1 Cranch, 137, 170 (1803).

On proper steps being taken, a secretary of state may be compelled to do a ministerial act; e. g., deliver a commission for an appointment already made. *Marbury v. Madison*, 1 Cranch, 137, 144 (1803).

In response to a subpoena *duces tecum* addressed to the President of the United States, President Jefferson, in a letter substantially written to the court (Marshall, C. J.) took the following position: "With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication." Trial of Aaron Burr (Coombs, ed.) page 74. On this, according to the report in the edition by Hopkins & Earle (vol. 2, p. 536), Chief Justice Marshall is reported to have said: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. . . . In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge." The rule is the same in Pennsylvania. Appeal of Hartranft, 85 Pa. St. 433, 449 (1877), and in New Jersey. "Whether the highest officer in the government or state will be compelled to produce in court any paper or document in his possession, is a different question. And the rule adopted in such cases is, that he will be allowed to withhold any paper or document in his possession, or any part of it, if, in his opinion, his official duty requires him to do so." *Thompson v. German Valley R. Co.* 22 N. J. Eq. 111 (1871). In a case where the court refused a subpoena *duces tecum* against the governor and secretary of state for the production of a written communication to the governor, alleged to have been libellous, concerning the plaintiff, the court say: "It is matter of very delicate concern to compel the chief magistrate of the state to produce a paper which may have been addressed to him, in confidence that it should be kept secret. Many will be deterred from giving to the Governor that information which is necessary, if they are to do it at the hazard of an action, and of all the consequences flowing from the enmity of the accused. It would seem reasonable, therefore, that the Governor, who best knows the circumstances under which the charge has

been exhibited to him, and can best judge of the motives of the accuser, should exercise his own judgment with respect to the propriety of producing the writing." *Gray v. Pentland*, 2 S. & R. 23, 32 (1815). In a later case in the same state, the governor and his subordinates and agents were sustained in a refusal to obey a subpoena requiring them to disclose facts learned in an official capacity. "Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury, must be determined by the Governor himself: and the weight of the reasons influencing him in the conclusion at which he has arrived, is for himself and not for the court to consider." *Appeal of Hartranft*, 85 Pa. St. 433, 449 (1877).

So in an action of tort in giving false information to the treasury department of an intended violation by the plaintiffs of the revenue laws of the United States, the defendants cannot be compelled to answer interrogatories relating to communications to the government. "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government. The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications." *Worthington v. Scribner*, 109 Mass. 487 (1872).

It would seem that not only are such disclosures of state secrets not compelled, but that they are not permitted. Thus in a case where a plaintiff brought an action against the United States in the Court of Claims on an alleged contract made by the President for secret services as a spy during the war, the Supreme Court, in rejecting the claim, do so upon the ground that the very nature of the contract prevents a suit on it. "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be

violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed." *Totten v. U. S.*, 92 U. S. 105 (1875).

The rule is the same in Canada. On an action of slander by a communication to the government at Ontario relating to the licensing of the plaintiff's hotel, the court compelled a disclosure by the head of the department against his objection. Held, error. "Whether the communication is a proper one in spirit, purpose, or language, cannot be known without the production of the document, and if the officer at the head of one of the High Government departments declines to produce it because it will not, in his opinion, be conducive to the public interest to do so, his judgment is conclusive." *Bradley v. M'Intosh*, 5 Ont. Rep. 227 (1884).

So held in a similar case in Lower Canada. "The Judges of this Court are all, I believe, agreed in the opinion, that the Head of a Department of state cannot be compelled, at the instance of a private suitor, to produce an official document in his custody, when the production of the document would, on grounds of public policy, be inexpedient. The question then arises, with whom does it rest to determine whether the production of a particular document is, on such general grounds, inexpedient? — The majority of the Court hold that the Head of the Department having official custody of the paper is necessarily the proper person to determine the question." *Gugy v. Maguire*, 13 Dec. des Tribunaux, 33, 51 (1863).

PUBLIC JUSTICE. — Considerations of public policy, substantially similar to those which prevent the divulging of state secrets, forbid inquiry into matters which would conflict with the orderly administration of justice.

Grand jurors cannot be admitted to testify as to the secrets of their jury room. *State v. Fasset*, 16 Conn. 457, 466 (1844).

For example, how they or their fellows voted. *Shelton v. State*, 30 Tex. 431 (1867); "The affidavit of one of the grand jury by whom an indictment was found, is not admissible to prove that there was no legal evidence before the grand jury upon which it was found, nor that there was illegal evidence used by the grand jury, nor that the names of certain witnesses were indorsed on the indictment, who were not sworn or examined by or before the grand jury during the examination or consideration of the charge set forth in the indictment." *State v. Beebe*, 17 Minn. 241 (1871).

Or, as to what witnesses testified before them. *Beam v. Link*, 27 Mo. 261 (1858).

Or how a witness testified. *Imlay v. Rogers*, 7 N. J. L. 347 (1800); *State v. Fasset*, 16 Conn. 457, 466 (1844).

The attorney-general, being part of the grand jury, will not be permitted to testify as to its proceedings. "It is the policy of the law, that the preliminary inquiry, as to the guilt or innocence of a party, against whom a complaint has been preferred, should be secretly conducted. In furtherance of the same object, every grand juror is sworn to secrecy. One reason may have been, to prevent the escape of the party charged, to which he might be tempted, if apprised of the proceedings in train against him. Another may have been, to promote freedom of deliberation and opinion among the grand jury, which might be impaired, if it were known that the part taken by each, might be disclosed to the accused or his friends. A timid juror might in that case be overawed by the power and connections of an individual charged." *McLellan v. Richardson*, 13 Me. 82 (1836).

Neither are grand jurors permitted to testify as to facts of their jury room, impugning their official finding. *State v. Oxford*, 30 Tex. 428 (1867).

For example, by evidence that a certain member of the inquest did or did not vote. *State v. Baker*, 20 Mo. 338 (1855). "Incalculable mischief must result to the public at large from such a course of proceeding." *Ibid.*

Or that an indictment was found upon insufficient testimony. *People v. Hulbut*, 4 Denio, 133 (1847); *State v. Beebe*, 17 Minn. 241 (1871).

Grand juries may, however, testify to a confession of the prisoner. *U. S. v. Charles*, 2 Cranch C. Ct. 76 (1813).

The requirement of secrecy on the part of the grand jury has, however, been relaxed where the public interest requires it. *Clark v. Field*, 12 Vt. 485 (1839).

For example, on an indictment for perjury in giving evidence before the grand jury the witness cannot shelter himself behind a claim that grand jurors must not testify as to what his evidence was before them. "It is not necessary to determine whether it was strictly competent for the members of the grand jury before which the perjury was alleged to have been committed, to testify as to what the defendant swore to on that occasion, without having been required so to do by judicial order, under the two hundred and eighteenth section of the Criminal Practice Act. If the witnesses violated the obligation of secrecy imposed upon them by the two hundred and seventeenth section, the defendant could not take advantage of it. The obligation is due and owing to the public, and not to the witness, and therefore its violation cannot be an occasion of offense to him. The point was fully considered in *State v. Broughton*, 7 Iredell, 101, and the Court say: 'It seems to

us that the witness has no privilege to have his testimony treated as a confidential communication, but that he ought to be considered as deposing, under all the obligations of an oath, in a judicial proceeding, and therefore that the oath of the grand jurors is no moral or legal impediment to his solemn examination, under the direction of a Court, as to the evidence before him, whenever it becomes material for the administration of justice. The Judges have not considered the rule as designed for the protection of witnesses, but for that of the grand jurors, and in furtherance of public justice.' Under our system, it cannot be considered that the rule of secrecy has any reference to the protection of witnesses testifying before grand juries, in view of the fact that the names of all such witnesses are required to be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the Court." *People v. Young*, 31 Cal. 563 (1867).

And where a witness has, it is said, testified differently before the grand jury from what he testifies on the trial, evidence of the grand jurors is competent as to what his statement was before them. "It is an axiom in the law of evidence that no testimony should be rejected unless greater evil is seen as likely to arise from its admission than from its rejection. What possible evils can arise from this evidence? Wherein does the testimonial trustworthiness of a grand juror differ from that of any other citizen? What matters it whether the contradictory and impeaching story of the witness in the street, or under oath and in the deliberations of the grand jury room, save that in the latter case it would be altered under the highest sanctions for testimonial veracity? Let this evidence be excluded, and to the precise extent of the exclusion, the means for arriving at correct conclusions are withheld from the consideration of the jury. Injustice is done. The guilty escape. The innocent are punished. Such are, or may be, the results from the exclusion of relevant and material testimony.

It would be a strange and anomalous principle of public policy, which should specially clothe with impunity crime committed in the presence of a body impanelled to inquire into its existence, and when found to exist, to present it for punishment. It would be a discreditable denial of justice, which should exclude material and relevant testimony, whether needed for the conviction of the criminal or required for the exculpation of the innocent. Where would be the policy of licensing mendacity without the fear of contradiction or of punishment? *State v. Benner*, 64 Me. 267 (1874).

The rule is the same in New Hampshire. *State v. Wood*, 53 N. H. 484 (1873). In Massachusetts it has been held that the evidence of a grand juror is competent to show what a witness at

the trial testified before the grand jury. "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. . . . But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula*. After the indictment is found and presented, and the accused is held to answer, and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defence by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist." *Conn. v. Mead*, 12 Gray, 167 (1858).

The rule making the proceedings of the grand jury privileged has been repealed by statute in certain jurisdictions. *Rocco v. State*, 37 Miss. 357 (1859).

A witness who testified before the grand jury is not precluded in any proper case from testifying as to what his evidence was. *Way v. Butterworth*, 106 Mass. 75 (1870).

Nor is any individual to whose case such fact is relevant prevented from inquiring as to what that evidence was. *Burdick v. Hunt*, 43 Ind. 381 (1873).

JURORS CANNOT IMPEACH THEIR VERDICT. — The testimony of jurors of irregularity or misconduct in a petty or traverse jury in their jury-room cannot be used to impeach their verdict. *Meade v. Smith*, 16 Conn. 346 (1844); *Folsom v. Manchester*, 11 Cush. 334 (1853); *People v. Hughes*, 29 Cal. 257 (1865); *Coker v. Hayes*, 16 Fla. 368 (1878).

The rule is the same in criminal cases. *State v. Coupenhaver*, 39 Mo. 430 (1867); *Read v. Com.* 22 Gratt. 924 (1872); *State v. Godwin*, 5 Ired. L. 401 (1845); *Johnson v. State*, 27 Tex. 758 (1865); *Bennett v. State*, 3 Ind. 167 (1851); *State v. Mellican*, 15 La. Ann. 557 (1860).

Accordingly, the affidavit of a jurymen that he would not have agreed to the verdict except that, on account of ill health, he was unable to bear further confinement, will not be received. *State v. Stokely*, 16 Minn. 282 (1871). "The affidavit comes within no known exception to the rule excluding the affidavits of jurors to impeach their own verdict." *Ibid*.

So the affidavit of a jurymen that if he had known that the court would double the verdict, he would not have agreed to it. *Hannum v. Belchertown*, 19 Pick. 311 (1837).

The evidence of jurymen, being incompetent to impeach their verdict, is equally incompetent to sustain it. "The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court; it is essential to the freedom and independence of their deliberations that their discussions in the juryroom should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty. Questions of the competency of such evidence have usually arisen upon its being offered with a view to overturn the verdict; for the party in whose favor the verdict has been rendered has ordinarily no need of further proof; but the decisive reasons for excluding the testimony of the jurors to the motives and influences which affected their deliberations are equally strong, whether the evidence is offered to impeach or to support the verdict." *Woodward v. Leavitt*, 107 Mass. 453, 460 (1871).

That the affidavit of a juror "is admissible in exculpation of himself, and to sustain the verdict," see *State v. Ayer*, 23 N. H. 301, 321 (1851).

The rule does not apply to the misconduct of a jurymen in getting from the defendant, out of court, additional evidence to that given his fellow jurymen. *Heffron v. Gallupe*, 55 Me. 563 (1867).

Evidence is admitted of affidavits of the other jurors as to their fellows obtaining a view of the *locus* for themselves. *Deacon v. Schreve*, 22 N. J. Law, 176 (1849).

Of a Tennessee decision, *Booby v. State*, 4 Yerg. 111 (1833), to the same effect as *Deacon v. Shreve* (*ubi supra*), the court in a later case, *Hudson v. State*, 9 Yerg. 408 (1836) say: "It is a dangerous principle, and we are not disposed to extend it one step beyond what it has already been carried."

"Jurors cannot be permitted to disclose their deliberations and proceedings while consulting together in their private room; but the rule does not extend to their conduct at other times and in other places." *Studley v. Hall*, 22 Me. 198 (1842).

As, for example, listening to evidence not offered in court. *Ritchie v. Holbrooke*, 7 S. & R. 458 (1821).

The courts of Iowa, with "considerable hesitation," lay down the following rule: "That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the juryroom, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast." *Wright v. Ill. &c. Tel. Co.*, 20 Ia. 195, 210 (1866).

Traverse jurors are, moreover, permitted to testify as to certain things connected with their work in the administration of justice.

For example, they are at liberty, on a plea of *res adjudicata*, to testify as to what matters the jury passed upon in a former action between the parties. "It is entirely different from where they are called to impeach a verdict on the ground of their own misbehavior or that of their fellows." *Follansbee v. Walker*, 74 Pa. St. 306 (1873).

A witness is none the less competent because he has served as a jurymen on a former trial of the cause. *Cramer v. City of Burlington*, 42 Ia. 315 (1875).

SOURCES OF INFORMATION, ETC. — An official charged with the enforcement of criminal law is not obliged to disclose the source of information as to the commission of offences. *U. S. v. Moses*, 4 Wash. C. Ct. 726 (1827); *Worthington v. Scribner*, 109 Mass. 487 (1872).

In *Worthington v. Scribner* (*ubi supra*) it is said that the "courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government."

But it has been held that this privilege, being intended for the benefit of the informant, may be waived by him, e. g., by testifying as a witness concerning the matter, and that the law officers may then testify as to the same matter, though the effect is to contradict and discredit the informant. *Oliver v. Pate*, 43 Ind. 132 (1873).

For similar reasons, one from whom property has been stolen,

is not bound to disclose the names of persons in his employment who gave the information which induced him to take measures for the detection of the persons indicted. *State v. Soper*, 16 Me. 293 (1839).

MATTERS AGAINST DECENCY.— Relevant evidence cannot be excluded merely because it concerns facts offensive to the morals or sense of decency of the court.

But there is a necessary discretion permitting the court to refuse to hear evidence offensive to the moral or social sense where the rights of the parties or the due administration of criminal law do not seem absolutely to require it.

In at least one important particular, perfectly relevant evidence is excluded on grounds of public policy. Husband and wife will not be permitted to testify, for the purpose of bastardying their offspring, that while residing together as a married couple they did not have sexual intercourse. *Goss v. Froman*, 89 Key. 318 (1889); *Cross v. Cross*, 3 Paige, 139 (1832); *Simon v. State*, 31 Tex. App. 186 (1892).

"The wife is not a competent witness to prove the non-access of her husband upon principles of public policy." *State v. Pettaway*, 3 Hawkes, 623 (1825).

But a wife has been permitted to testify to the fact of sexual intercourse with her husband to legitimize her child. *Goss v. Froman*, 89 Key. 318 (1889).

Or as to criminal intercourse with others during coverture. *State v. Pettaway*, 3 Hawkes, 623 (1825); *Com. v. Shepherd*, 6 Binney, 283 (1814); *Cross v. Cross*, 3 Paige, 139 (1832); *Com. v. Wentz*, 1 Ashmead, 269 (1826); *Dean v. State*, 29 Ind. 483 (1868).

It is not objectionable to prove non-access on the part of the husband. For example, that he was in the active service of the confederate army at the time when the child must have been begotten, that he did not come home, and his wife did not visit him. *Scott v. Hillenburg*, 85 Va. 245 (1888).

That the husband had abandoned his wife and removed to a distant state and not returned. *Pittsford v. Chittenden*, 58 Vt. 49 (1886); *Tate v. Penne*, 7 Martin, N. S. 548 (1829).

Or had abandoned his wife. *Cross v. Cross*, 3 Paige, 139 (1832).

But in a bastardy complaint, in favor of a married woman separated from her husband, the supreme court of Wisconsin has refused to permit the prosecutrix to testify that her husband has not had intercourse with her. "Testimony of the wife even tending to show such fact or of any fact from which such non-access could be inferred, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case; and such non-access and illegitimacy must be clearly proved by other testimony." *Mink v. State*, 60 Wis. 583 (1884).

CHAPTER II.

MATTERS NOT PROVABLE BY A SINGLE WITNESS.

§ 952.¹ UNDER this head it is proposed to mention briefly the Statutes as to Treason and certain other statutes and rules of law which regulate particular cases, and take them out of the operation of the general principles by which they would otherwise be governed.

§ 952A. By the common law *treason* and the modern misprision of treason were sufficiently proved by one credible witness.² But by statute it is enacted that no person shall be indicted, tried, or attainted of treason but upon the oaths and testimony of *two lawful witnesses*, either both to the same overt act, or one to one and the other to another overt act of the same treason, unless the accused shall willingly without violence, in open court, confess the same;³ and further, that if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason.⁴

§ 953. This protective rule as to treason—which in England has existed since the days of William III., and in Ireland was adopted in the year 1821,—has been incorporated, with some slight variation, into the constitution of America,⁵ and may be met with in the statutes of most, if not all, of the States in the Union.

§ 953A. From the earliest notice of this rule, which is in a re-

¹ Gr. Ev. § 255, in part.

² Fost. C. L. 233; M'Nally, Ev. (Ir.) 31; R. v. Clare, 1803; Woodbeck v. Keller, 1826 (Am.).

³ As to the confession, see ante, § 866.

⁴ 7 W. 3, c. 3 ("The Treason Act, 1695"), §§ 2, 4, extended to Ireland

by 1 & 2 G. 4, c. 24.

⁵ "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt act*, or on confession in open court:" Const. U. S. Art. 3, § 3; Laws U. S. vol. 2, ch. 36, § 1.

pealed statute temp. Henry VIII.,¹ it appears probable, that the original reason for its adoption was that, "Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and, anciently, heresy was treason; and from thence the Parliament thought fit to appoint, that two witnesses ought to be for proof of high treason."²

§ 954. Its modern continuance may be ascribed, in part, to the tenacity with which men hold to established forms; in part to the duty of allegiance, which may be supposed to counterpoise the information of a single witness;³ and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused, while the counter-presumption, that on so serious a trial no witness would be guilty of criminative perjury is forgotten.⁴ But the best reasons, for the regulation are, that, on State trials, the prisoner has to contend against the whole power of the Crown; which is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused and to his family, were, until very recently,⁵ savage and revolting.

§ 955. Notwithstanding the above rule, it is sufficient to warrant a conviction if there be one witness to one overt act of treason, and another witness to another overt act of the same species of treason.⁶ Moreover, any *collateral* matter not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extrajudicial confession of the prisoner, or by other evidence admissible at common law.⁷ For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the British Crown may be established by his admission, or by the testimony of one witness.⁸

¹ 25 Hen. 8, c. 14.

² *Ld. Stafford's case*, 1680 (*Ld. Nottingham, C.*).

³ 4 *Bl. Com.* 358.

⁴ 3 *Benth. Ev.* 391, 392.

⁵ 33 & 34 V. c. 23 ("The Forfeiture Act, 1870"), §§ 1, 31.

⁶ *Ld. Stafford's case*, 1680.

⁷ *Fost. C. L.* 242; 1 *East, P. C.* 130.

⁸ *R. v. Vaughan*, 1696 (*Ld. Holt*).

§ 956.¹ In treason, and misprision of treason, no evidence can be given of any overt act not expressly laid in the indictment.² The meaning of this rule is, not that the whole detail of facts shall be set forth, but that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment, or unless it conduce to the proof of any of the overt acts which are laid.³ Accordingly, in one case,⁴ prisoner's correspondence with the Pretender was allowed to be read in evidence, although it was a substantive treason in itself,⁵ and was not charged as an overt act in the indictment, because it tended directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne. On similar grounds the publication of the Pretender's manifesto by a prisoner was read against him in 1746, since it was strong proof of the intention with which he had joined the rebel army, and so was evidence in support of the overt act laid in the indictment charging him with marching in a warlike manner to depose the King.⁶ On the other hand, however, when a prisoner was indicted for adhering to the King's enemies, and the overt act laid was his cruising on the King's subjects in the Royal Clancarty, the court rejected the evidence of his cruising in another vessel; as, if it were true, it would be no sort of proof of the act for which he was then to answer.⁷

§ 957.⁸ This rule is moreover not peculiar to trials for treason; though expressly enacted in the later statutes of treason. But it is nothing more than a particular application of the well-known doctrine, that the proof must correspond with the allegations, and be confined to the point in issue.⁹ The issue in treason is, whether the prisoner committed that crime by doing one or more of the treasonable acts stated in the indictment; just as in defamation it is, whether defendant injured plaintiff by maliciously uttering any

¹ Gr. Ev. § 256, in part, as to first six lines.

² 7 W. 3, c. 3 ("The Treason Act, 1695"), § 8. This section is not incorporated in the Irish Act of 1 & 2 G. 4, c. 24, but as the rule is also recognized at common law, this would seem to be immaterial.

³ Fost. C. L. 245; 1 East, P. C.

121—123.

⁴ Loyer's case, 1722.

⁵ By 13 W. 3, c. 3 ("The Act of Settlement"), § 2.

⁶ R. v. Deacon, 1746; R. v. Wedderburn, 1746.

⁷ R. v. Vaughan, 1696.

⁸ Gr. Ev. § 256, in part.

⁹ Ante, §§ 218, 298.

of the slanders laid in the statement of claim. In either case evidence of collateral facts is admitted or rejected on the like principle, accordingly as it does or does not tend to establish the specific charge. The declarations of the prisoner, and seditious language used by him, are accordingly admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy in which he was engaged;¹ and, in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in other counties, may be given in evidence, subject, however, to such proof being ultimately rejected if the overt act, in corroboration of which they are tendered, is not proved to have been done in the county as laid.²

§ 958. In connection with this subject it only remains to be noticed that the protective provisions of the Statutes of Treason which have just been mentioned,³ do not apply to treasons which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, of the Queen, where the overt act or acts alleged are the assassination of her Majesty, or any attempt to injure in any manner whatsoever her Royal person; or to the misprisions of any such treason. In all these cases the accused is indicted, arraigned, tried and attainted, *upon the like evidence*, as if he stood charged with murder.⁴

§ 959.⁵ In proof of the crime of *perjury* two witnesses were, it seems, formerly thought to be necessary.⁶ This strictness, however, if it ever was law, has long since been relaxed.⁷ The true principle is merely this, that the evidence showing the falsity must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.⁸ The oath of the opposing witness, therefore, will not avail, unless corroborated

¹ R. v. Watson, 1817; United States v. Hanway, 1851 (Am.).

² R. v. Laver, 1722; R. v. Deacon, 1746; R. v. Vane, 1662.

³ 7 A. c. 21 ("The Treason Act, 1708"); 7 W. 3, c. 3 ("The Treason Act, 1695"); 6 G. 3, c. 53, § 3.

⁴ 39 & 40 G. 3, c. 93 ("The Treason Act, 1800"); 1 & 2 G. 4, c. 24, § 2, Ir.; 5 & 6 V. c. 51 ("The Treason Act, 1842"), § 1. § 2 of this last Act makes it a high misdemeanor to discharge or aim fire-arms, or throw

or use any offensive matter or weapon with intent to injure or alarm her Majesty.

⁵ Gr. Ev. § 257, in part.

⁶ This is said to have been the opinion of Ld. Tenterden: 3 St. Ev. 860, n. g.; R. v. Champney, 1836 (Coleridge, J.).

⁷ The supposed history of its relaxation is given in n. 2 to § 257 of Greenleaf on Ev. (15th edit.) 1892.

⁸ See R. v. Lee, 1766, cited 2 Russ. C. & M. 650.

by material and independent circumstances; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, the jury could not safely convict.¹ So far the rule is founded on substantial justice.² It would not, however, be precisely accurate to say, that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose.³ For instance, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness.⁴ But the confirmatory evidence will not be sufficient to warrant a conviction if it be so only in some slight particulars;⁵ but it must at least be strongly corroborative;⁶ or, as has been said in quaint but energetic language, “a strong and clear evidence, and more numerous than the evidence given for the defendant.”⁷

§ 960.⁸ When several assignments of perjury are included in the same indictment, it does not seem clearly settled whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each. The better opinion is that such proof is necessary; and *that*, too, although all the perjuries assigned were committed at one time and place.⁹ For instance, if a person, on putting in his statement of affairs in bankruptcy, or on other the like occasion, has sworn that he has made certain

¹ 4 Bl. Com. 358; *R. v. Gaynor*, 1839 (Ir.); *R. v. Braithwaite*, 1859 (Watson, B., and Hill, J.).

² *R. v. Yates*, 1841 (Coleridge, J.).

³ *R. v. Gardiner*, 1839 (Patteson, J.); *R. v. Shaw*, 1865.

⁴ *R. v. Mayhew*, 1834 (Ld. Denman). See, also, *R. v. Towey*, 1860.

⁵ *R. v. Yates*, 1841 (Coleridge, J.); *R. v. Boulter*, 1852.

⁶ *R. v. Champney*, 1836, and *R. v. Wigley*, 1835 (Coleridge, J.); *Jorden v. Money*, 1854 (Ld. Brougham), H. L.; *Woodbeck v. Keller*, 1826 (Sutherland, J.) (Am.); *Reg. v. Braithwaite*, 1864; *Reg. v. Boulter*, infra; *State v. Buie*, 1875 (Am.); *State v. Held*, 1874 (Am.). Any attempt to define the degree of corroboration required will be illusory:

Reg. v. Shaw, 1867.

⁷ *R. v. Muscot*, 1713 (Parker, C.J.). See *The State v. Molier*, 1826-34 (Am.); *The State v. Hayward*, 1819 (Am.); *Clark's Exors. v. Van Reimsdyk*, 1815 (Am.).

⁸ Gr. Ev. § 257A, nearly verbatim.

⁹ *R. v. Virrier*, 1840 (Ld. Denman); *Williams v. Comm.*, 1879 (Am.); *Reg. v. Parker*, 1842, Staff. Summer Assizes, ubi supra; and also cited Russell on Crimes, vol. iii. (5th edit.) p. 80. But where the act denied is of a continuous nature, e.g., “treating,” proof of one act in pursuance of it at one part of the day proved by one witness, and of another act in pursuance of it at another part of the day proved by another witness, will be sufficient: *R. v. Hare*, 1876.

payments, and is then indicted for perjury on several assignments, each specifying a particular payment which has not been made, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.¹

§ 961.² The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America that a man may be convicted of perjury on documentary and circumstantial evidence alone,—*first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.³

§ 962.⁴ If the evidence adduced in proof of the crime of perjury consists of *two opposing statements by the prisoner*, and nothing

¹ *R. v. Parker*, 1842 (Tindal, C.J.). In *R. v. Mudie*, 1831, Ld. Tenterden refused to stop such a case, saying that defendant, if convicted, might move for a new trial. He was acquitted, however.

² Gr. Ev. § 258, in part.

³ *U. S. v. Wood*, 1840 (Am.). In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases

where goods, wares, or merchandize have been actually purchased," upon the evidence of the invoice-book of his father, John Wood, of Saddleworth, Eng., and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the Government of the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves attentive perusal.

⁴ Gr. Ev. § 259, in great part.

more, he cannot be convicted. For if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances against him.¹ And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given.² If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered with*,³ or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained.⁴ Where, too, the nature of the statements was such, that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence of the falsehood of the one deposed to by the prisoner would probably be sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time.⁵ Moreover, when a man merely swears to the best of his

¹ See Alison, Cr. L. (Sc.) 481.

² R. v. Wheatland, 1838 (Gurney, B.); R. v. Gaynor, 1839 (Ir.); R. v. Harris, 1822.

³ Anon., 1764 (Yates, J., Ld. Mansfield, Wilmut and Aston, JJ., concurring). See observations of Mr. Greaves on this case, in 2 Russ. C. & M. 653, n.

⁴ R. v. Knill, 1822; R. v. Hook, 1857.

⁵ Holroyd, J., in R. v. Jackson, 1823. This very reasonable doctrine is in perfect accordance with the rule of the criminal law of Scotland, as laid down by Mr. Alison, in his excellent treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contra-

diction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded, that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition." See Alison, Cr. L. (Sc.) 476.

memory and belief, it of course requires very strong proof to show that he is wilfully perjured.¹

§ 963. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. Therefore, the holding of the court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence.² Moreover, when several facts must be proved to make out an assignment of perjury, each of these facts may, in strict law, be established by the uncontroverted testimony of a single witness. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury.³

§ 964. Cases of *bastardy* form another class of cases in which the evidence of more than one witness is required. A man cannot be adjudged to be the putative father of an illegitimate child on the single testimony of the mother; but before an order of affiliation can be made by the petty sessions,⁴ or confirmed by the quarter sessions,⁵ the mother must not only be a witness,⁶ but her evidence must be corroborated,⁷ *in some material particular*, by other testimony, to the satisfaction of the justices; and the order will be bad, if it does not allege that the confirmatory evidence was material.⁸ This rule protects men from accusations which profligate, designing, and interested women might easily make, which, however false, it might be extremely difficult to disprove. Still, it must not be

¹ Tindal, C.J., in *R. v. Parker*, 1842.

² 2 Russ. C. & M. 654; 2 Hawk. P. C. c. 46, § 10; *Com. v. Pollard*, 1847 (Am.).

³ *R. v. Roberts*, 1848 (Patteson, J.).

⁴ 35 & 36 V. c. 65 ("The Bastardy Laws Amendment Act, 1872"), § 4; 36 V. c. 9 ("The Bastardy Laws

Amendment Act, 1873"), § 5. Therefore, if she be dead there is no jurisdiction. *The Queen v. Armitage*, supra.

⁵ 8 & 9 V. c. 10 ("The Bastardy Act, 1845"), § 6.

⁶ *R. v. Armitage*, 1872.

⁷ See *Hodges v. Bennett*, 1860.

⁸ *R. v. Read*, 1839.

strained so as to render corroboration necessary with respect to the actual begetting of the child, but it will suffice if any evidence be forthcoming calculated to raise a probability that illicit intercourse may have taken place, as, for example, proof of acts of familiarity between the mother and the putative father, though these may have occurred long prior to the date when the child was begotten.¹

§ 964A. In actions for breach of promise of marriage, again, more than one witness other than the plaintiff is needed. The plaintiff, though now an admissible witness, cannot recover a verdict on his or her own uncorroborated testimony, but some other *material* evidence in support of the promise must be forthcoming.²

§ 964B. Moreover, in certain settlement cases, one witness is not sufficient. For no order for the removal of a pauper, in respect of a settlement acquired by three years' residence in a parish, can be made "upon the evidence of the person to be removed, without such corroboration as the justices or court *may think sufficient*."³

§ 965. It has sometimes been supposed that it is an absolute rule of law that a court *cannot* act on the unsupported testimony of any person in his own favour.⁴ But there is no actual rule of law to the effect suggested; though a court ought to regard a claim against a dead man's estate which is only supported by the evidence of the claimant with jealous suspicion, and neither itself act upon it nor allow a jury to do so without corroboration,⁵ and this irrespective of persons.⁶

§ 966. Again, in *Ecclesiastical Courts* the testimony of a single witness, though "*omni exceptione major*," is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call "*adminicular circumstances*."⁷ This doctrine is now of little practical importance,

¹ *Cole v. Manning*, 1877.

² 32 & 33 V. c. 68, § 2. See *Hickey v. Campion*, 1872 (Ir.); *Bessela v. Stern*, 1877, C. A.

³ 39 & 40 V. c. 61, § 34; *R. v. Abergavenny Union*, 1880.

⁴ *In re Harnett, Leahy v. O'Grady*, 1886 (Ir.); *Down v. Ellis*, 1865; *Grant v. Grant*, 1865; *Nunn v. Fabian*, 1866; *Hartford v. Power*, 1869 (Ir.); *U. falsely called J. v. J.*, 1867.

⁵ *In re Garnett, Gandy v. Macaulay*, 1885, C. A.; *In re Hodgson, Beckett v. Ramsdale*, 1885, C. A.; *Finch v. Finch*, 1882, C. A.; *Rogers v. Powell*, 1869 (James, V.-C.); *Hartford v. Power*, 1869 (Ir.).

⁶ *Re Harnett, Leahy v. O'Grady*, 1886 (Ir.); *Mahain v. McCullagh*, 1891 (Ir.).

⁷ *Donellan v. Donellan*, 1795; *Simmonds v. Simmonds*, 1847 (Dr. Lushington); *Id.* (Sir H. Fust);

as the spiritual courts have, by a series of legislative improvements, been shorn of most of their jurisdiction over the laity, though they still possess it over the clergy. In prosecutions under the Church Discipline Act,¹ the Court of Arches will still be guided by the old ecclesiastical rules as to evidence, and will require the testimony of a single witness to be corroborated at least to a certain extent.²

§ 966A. In the Probate and Divorce Division of the High Courts, whether for England or Ireland, the rules of evidence observed in the old superior Courts of Common Law are applied to the trial of all questions of fact.

§ 967. Cases which depend upon the evidence of *accomplices* form another class of cases in which corroboration is usually required; for accomplices, are usually interested,³ and always infamous, witnesses, whose testimony is admitted from necessity, since it is often impossible to bring the principal offenders to justice without having recourse to such evidence. In⁴ point of law, an accomplice is a competent witness. Even when he is upon his trial with his fellows, if the case against him be only slight, an acquittal, as against him, will usually be directed, and his evidence taken.⁵ But the admission of the evidence of an accomplice, who is on his trial, is entirely a matter for the discretion of the judge, who will generally refuse to accept the evidence of an accomplice who appears to have really been the principal offender.⁶ After conviction for an offence which has merely been punished by inflicting a fine, an accomplice is a competent witness after he has paid his fine.⁷ But in any case, where the evidence of an accomplice is received, the *degree of credit* which ought to be given to his testimony is a matter exclusively within the province of the jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by

Crompton v. Butler, 1790; Hutchins v. Denziloe, 1792.

¹ 55 & 56 V. c. 32.

² Berney v. Bp. of Norwich, 1866, P. C. This case seems to overrule Burder v. O'Neill, 1863.

³ It used to be "a popular saying, that they fished for prey, like tame cormorants, with ropes round their

necks": Macaulay's History of Engl. vol. 1, ch. 5, p. 666.

⁴ Gr. Ev., in great part.

⁵ Greenleaf on Ev., 15th edit., (1892), § 379.

⁶ People v. Whipple, 1827 (Am.); Id.

⁷ Rex v. Burley, 1818; Commonwealth v. Knapp, 1830 (Am.).

prudence and reason. But no positive rule of law exists on the subject; and the jury may, if they please, act upon the evidence of the accomplice, even in a capital case, without any confirmation of his statement.¹ Judges, however, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review,² its omission will, in most cases, be deemed a neglect of duty on the part of a judge.³ Considering, too, the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice.⁴ The judges do not, in such cases, withdraw the cause from the jury by positive directions to acquit, but they only advise them not to give credit to the testimony.

§ 968. It has been suggested that this practice is not applicable to *misdemeanour*.⁵ There appears, however, to be no foundation, either in reason or law, for such a distinction between misdemeanours and felonies; and if it ever existed, it now no longer prevails. And the fact that the accomplice has, before giving his evidence, been convicted summarily of another offence under the same Act, affords no ground for dispensing with corroboration of his evidence.⁶ At the same time, the practice of the caution from the bench is not so uniform in cases of misdemeanours as in felonies. For if the offence be one of a purely legal character, as, for instance, the non-repair of a highway,—or if it imply no great moral delinquency, as the fact of having been present as a spectator at a prize-fight,⁷ which unfortunately terminated in manslaughter,⁸—the parties concerned, though in the eye of the law criminal, will not be considered such accomplices as to render necessary any confirmation of their evidence. Neither, in actions for penalties, does the law apprehend any danger from the mere fact of jurors being

¹ *R. v. Stubbs*, 1855; *R. v. Hastings*, 1835 (Ld. Denman); *R. v. Jones*, 1809 (Ld. Ellenborough); *R. v. Atwood*, 1789; *R. v. Durham*, 1787; *R. v. Dawber*, 1821; *R. v. Sheehan*, 1826; *R. v. Jarvis*, 1837.

² *R. v. Boyes*, 1861.

³ *R. v. Barnard*, 1823; *R. v. Wilkes*,

1836.

⁴ *R. v. Gallagher*, 1883.

⁵ Per Gibbs, Att.-Gen., arg. in *R. v. Jones*, 1809.

⁶ *R. v. Farler*, 1837.

⁷ See *R. v. Coney*, 1882.

⁸ *R. v. Hargrave*, 1831 (Patteson, J.); *R. v. Young*, 1866.

left, without any special caution from the bench, to weigh the uncorroborated testimony of an accomplice.¹

§ 969.² But although, on ordinary criminal trials, it is the settled practice to require evidence in corroboration of that of an accomplice, yet the *manner and extent of the corroboration* required are not very clearly defined. Some judges have deemed it sufficient, if the witness be confirmed in any material part of the case; others have been satisfied with confirmatory evidence as to the *corpus delicti* only; others, again, have thought it essential that corroborative proof should be given of the *prisoner* having actually participated in the offence; and that when several prisoners are tried, confirmation should be required as to all of them, before all can be safely convicted.³ This last is undoubtedly now the prevailing opinion; the confirmation of the witness, as to the commission of the crime, being considered no confirmation at all, as it respects the prisoner. For, in describing the circumstances of the offence, he may have no inducement to speak falsely, but on the contrary every motive to declare the truth, if he wishes to be believed when he shall afterwards endeavour to fix the crime upon the prisoner.⁴

§ 970. A late learned judge said⁵ that in his opinion the corroboration "ought to consist in some circumstance that affects *the identity of the party accused*. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly, that he had described how the person did put a knife to the throat, and did steal the property. It would not at all tend to show that the party accused participated in it. * * * The danger is, that when a man is fixed, and knows that his own guilt is detected, he will purchase impunity by falsely accusing others." The real rule, however, appears to be that the extent of the corro-

¹ M'Clory v. Wright, 1860 (Keogh, J.) (Ir.); Magee v. Mark, 1860-1 (Ir.).

² Gr. Ev. § 381, in great part.

³ R. v. Stubbs, 1855.

⁴ R. v. Farler, 1837 (Ld. Abinger);

R. v. Wilkes, 1836 (Alderson, B.); R. v. Moores, 1836; R. v. Addis, 1834 (Patteson, J.); R. v. Wells, 1829 (Littledale, J.); R. v. Sheehan, 1826 (Ir.); R. v. Carey, 1837 (Ir.).

⁵ R. v. Farler, 1837 (Ld. Abinger).

boration required will depend upon the gravity of the crime.¹ In any case, moreover, in which two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same confirmation is required as if they were but one.² The testimony, too, of the wife of an accomplice will not be considered corroborative of the evidence of her husband.³

§ 971.⁴ To one class of persons, *apparently accomplices*, the rule requiring corroborative evidence does not apply; namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. The early disclosure is considered as binding the party to his duty; and though a great degree of disfavour may attach to him for the part he has acted as an *informer*,⁵ yet his case is not treated as that of an accomplice.⁶ Moreover, it has been held in America that one who only enters into communication with criminals without any criminal intent himself, and solely for the purpose of detecting them in a criminal act, is not an accomplice.⁷ It has also been there held that in any case to be an accomplice, one must be indictable as a participator in the offence.⁸ Yet it has been laid down in America that officers of justice and detectives have no right to decoy others into crime in order to capture them as offenders, and that, indeed, to do so may even be criminal.⁹ Moreover, if property be taken with a man's *consent*, even though such consent be given in order that the taker may be convicted of theft, such taking has, in America, been held to be no larceny.¹⁰

¹ *R. v. Jervis*, 1837. Whether a woman who voluntarily submits to an attempt to procure abortion is an accomplice or not, probably depends in each case on the facts. See *R. v. Cramp*, 1880. In America, it is said to have been decided (it is hard to see on what grounds) that she usually must not be so regarded: Greenleaf on Ev. 15th edit. (1892).

⁵ *Valore*. "But these are called Informers; men that live

By treason, as rat-catchers do by poison."

Beaumont's "Woman Hater," Act V., Sc. 2.

⁶ *R. v. Despard*, 1803 (Ld. Ellenborough).

⁷ *Com. v. Downing*, 1855 (Am.); *State v. McKean*, 1873 (Am.).

⁸ *Com. v. Wood*, 1858 (Am.); *Com. v. Boynton*, 1874 (Am.).

⁹ See *Cannon v. People* (Am.).

§ 332, and note thereto. Why is she not an accomplice, on the same grounds as if when two attempt suicide together the survivor is guilty of murder?

² *R. v. Noakes*, 1832 (Littledale, J.); *R. v. Magill*, 1842 (Perrin, J.) (Ir.).

³ *R. v. Neal*, 1835 (Park, J.).

⁴ Gr. Ev. § 382, almost verbatim.

¹⁰ *Ibid*.

AMERICAN NOTES.

Corroboration Required. — The policy of English law, while wisely refusing undue importance to mere numbers among witnesses, has prescribed that in certain instances a single oath shall not suffice for affirmative action.

TREASON. — By Article III., section 3 of the Constitution of the United States, it is provided that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court."

Fries' Case, Wharton's State Trials, 482, 585 et seq. (1799); *U. S. v. Hanway*, 2 Wall. Jr. 139 (1851); 1 Burr's Trial (Hopkins & Earles Edition) 196.

PERJURY. — If on an indictment for perjury the falsity of the oath alleged to be perjured upon is proved merely by an oath of a single witness, the defendant is entitled to be discharged.

So also by statute. *Beach v. State*, 32 Tex. App. 240 (1893); *People v. Wells*, 103 Cal. 631 (1894).

"It is a right rule, founded upon that principle of natural justice which will not permit one of two persons, both speaking under the sanction of an oath, and, presumptively, entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow." *U. S. v. Wood*, 14 Pet. 430, 440 (1840). "It is a well-established rule of evidence, that the testimony of a single witness is insufficient to warrant a conviction on a charge for perjury. But it does not appear to be anywhere laid down that two witnesses are necessary to disprove directly the fact sworn to by the Defendant, although in addition to the testimony of a single witness, some other independent evidence ought to be adduced." *State v. Molier*, 1 Dev. 263 (1827).

The rule is not so construed as to require the scale to be turned in favor of the prosecution by the evidence of another witness as to the falsity of the oath of defendant. *Woodbeck v. Keller*, 6 Cowen, 118 (1826); *Hendricks v. State*, 26 Ind. 493 (1866).

It is not necessary that "to establish the giving of the testimony upon which the perjury is assigned" there should be more than one witness. *State v. Wood*, 17 Ia. 18 (1864); *Com. v. Pollard*, 12 Metc. 225 (1847); *State v. Hayes*, 70 Hun, 111 (1893).

Independent circumstances of corroboration are sufficient. *Woodbeck v. Keller*, 6 Cowen, 118 (1826). "In what cases may a living witness to the *corpus delicti* of a defendant, be dispensed with, and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent. In

cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath; the oath only being proved to have been taken. In cases where a party is charged with taking an oath, contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters, relating to the fact sworn to; or by other written testimony existing and being found in the possession of a defendant, and which has been treated by him as containing the evidence of the fact recited in it." *U. S. v. Wood*, 14 Pet. 430, 441 (1840). "Proof that the defendant has made statements verbally or in writing, under oath, or not under oath, conflicting with the statement under oath upon which the indictment is founded, is competent evidence on an indictment for perjury, and such evidence, in connection with the testimony of one other witness, has been held sufficient to warrant a conviction." *Dodge v. State*, 24 N. J. L. 455 (1854).

It is error to instruct the jury that this corroboration on the issue of falsity must be equivalent to a second witness. "The oath of the opposing witness therefore, will not avail, unless it be corroborated by other independent circumstances. But it is not precisely accurate to say that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances, before the party can be convicted. The additional evidence need not be such as standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose; but it must be at least strongly corroborative of the testimony of the accusing witness; or in the quaint, but energetic, language of Parker, C. J., 'a strong and clear evidence, and more numerous than the evidence given for the defendant.'" *State v. Heed*, 57 Mo. 252 (1874).

"On this point the court below charged the jury, that 'the corroborative evidence need not be of sufficient force to equal the positive testimony of another witness, or such as would require the jury to convict in a case in which a single witness is sufficient, but that it must be such as gives a clear preponderance to the evidence in favor of the state,' and, in view of this rule, establishing the perjury beyond a reasonable doubt. This charge of the court below is sustained by the weight of modern authorities, and is, we think, substantially correct." *Crusen v. State*, 10 Oh. St. 258 (1859).

Evidence that the defendant testified differently on a former trial is sufficient corroboration. *State v. Blize*, 111 Mo. 464 (1892).

"The corroboration must be by independent circumstances, tend-

ing to show the same results, and not merely that the account is probable." *State v. Raymond*, 20 Ia. 582 (1866).

A more liberal statement of the rule has been laid down by the supreme court of Arkansas. "The old rule that to convict of perjury two witnesses were necessary, has been relaxed; and a conviction may be had upon any legal evidence of a nature and amount sufficient to outweigh that upon which perjury is assigned." *Marvin v. State*, 53 Ark. 395 (1890).

The same rule applies on an indictment for subornation of perjury. *People v. Evans*, 40 N. Y. 1 (1869). And to civil cases where perjury is to be proved.

For example, in establishing the defence of truth in an action for slandering the plaintiff by asserting that she had committed perjury. *Woodbeck v. Keller*, 6 Cowen, 118 (1826).

On a special action on the case, given by statute, against one summoned as a trustee in foreign attachment for knowingly and wilfully answering falsely upon his examination on oath, the action cannot be maintained upon the testimony of one witness only as to the falseness of the answer; but the same amount of evidence is required as would be necessary to convict the defendant of perjury. *Laughran v. Kelly*, 8 Cush. 199 (1851). "By the well-settled rules of law, there is a class of cases which do not come within the general principles of evidence, but which must be proved by a greater amount of testimony than is ordinarily required to establish a case in a court of justice. Whenever a false oath is the gist of the matter to be proved, or it becomes necessary to control the statement of a party who is compelled to answer under oath allegations made against him, something more than the testimony of a single witness is necessary to constitute legal proof. The reason for this rule is consonant to the plainest dictates of justice. The law attributes such force and effect to the oath of every man given in the course of judicial proceedings, that it cannot be overcome or outweighed, to his prejudice, by the simple, naked, unsupported oath of another person. In such cases there is oath against oath; the scale of evidence is exactly balanced, and something more is necessary to destroy the equilibrium, which must be done by other witnesses or corroborating testimony. So strictly was this rule formerly held, that in proof of the crime of perjury two witnesses were necessary; and although, by the course of modern decisions, this rule is now modified, it is still essential, that the oath of the opposing witness should be corroborated by independent evidence of such a character as clearly to turn the scale and overcome the oath of the defendant." *Laughran v. Kelly*, 8 Cush. 199 (1851).

It is merely on the point of the falsity of the oath alleged to be perjured that corroboration is required. Other necessary allega-

tions in the indictment may be proved under the usual rule. "Nor is any other testimony necessary in a case of perjury than in other cases, except to disprove the fact sworn to by the defendant: That he did take the oath, and the terms of the oath, may be proved by one witness." *State v. Hayward*, 1 N. & McC. 546 (1819).

BASTARDY AND SEDUCTION. — As in England, it has frequently been required by statute that for an affiliation order the evidence of the prosecutrix must be corroborated.

For example, by accusation during travail. *Stiles v. Eastman*, 21 Pick. 132 (1838).

So corroboration has been required by statute, in an action for seduction. *State v. Wells*, 48 Ia. 671 (1878).

DIVORCE. — To secure an absolute divorce, it is required by the laws of many states that the statements of the libellant should be corroborated in some material particular. "It is the settled rule of this court that a divorce *a vinculo* will not be granted on the testimony of the complainant alone, as to the cause of divorce." *Tate v. Tate*, 26 N. J. Eq. 55 (1875). But this "rule, upon which the judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libellant, is merely a general rule of practice, and not an inflexible rule of law. When other evidence can be had, it is not ordinarily safe or fit to rely upon the testimony of the party only. But sometimes no other evidence exists, or can be obtained. The parties are made competent witnesses by statute, and there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established." *Robbins v. Robbins*, 100 Mass. 150 (1868).

To the same effect is *Flattery v. Flattery*, 88 Pa. St. 27 (1878).

ACCOMPLICES. — The rule is well settled that, the jury being the sole judge of the credibility of witnesses, they may convict, in a criminal case, upon the uncorroborated evidence of an accomplice. *State v. Russell*, 33 La. Ann. 135 (1881); *Watson v. Com.*, 95 Pa. St. 418 (1880); *People v. Costello*, 1 Denio, 83 (1845); *State v. Watson*, 31 Ia. 361 (1861); *Com. v. Bosworth*, 22 Pick. 397 (1839); *Com. v. Kibling*, 63 Vt. 636 (1891); *State v. Miller*, 97 N. C. 484 (1887); *Parsons v. State*, 43 Ga. 197 (1871); *State v. Stebbins*, 29 Conn. 463 (1861); *R. v. Beckwith*, 8 C. P. U. C. 274 (1859), confined in *R. v. Andrews*, 12 Ont. Rep. 184 (1886); *People v. Evans*, 40 N. Y. 1 (1869); *Cheatham v. State*, 67 Miss. 335 (1889); *State v. Dawson*, 124 Mo. 418 (1894); *Porath v. State*, 90 Wis. 527 (1895); *Lamb v. State*, 40 Neb. 312 (1894); *State v. Patterson*, 52 Kans. 335 (1893); *Jenkins v. State*, 31 Fla. 196 (1893); *State v. Barber*, 113 N. C. 711 (1893).

"The degree of credit, to be given to an accomplice, was submitted to the jury with proper instructions. There is no rule

of law that they may not convict upon such testimony. There should be none such. The degree of credit to be given to a witness, whatever may be his character or position in a cause, should not be arbitrarily determined in advance of his testimony and in ignorance of the circumstances affecting its credibility." *State v. Litchfield*, 58 Me. 267 (1870).

"Although it has often been said by judges and elementary writers, that no person should be convicted on the testimony of an accomplice unless corroborated by other evidence, still there is no such inflexible rule of law. It is a question for the jury, who are to pass upon the credibility of an accomplice, as they must upon that of every other witness. His statements are to be received with great caution, and the court should always so advise; but, after all, if his testimony carries conviction to the mind of the jury and they are fully convinced of its truth, they should give the same effect to such testimony as should be allowed to that of an unimpeached witness, who is in no respect implicated in the offence. Such testimony will authorize a conviction in any case. The court certainly should advise great caution on the part of the jury, where the prosecution depends upon the uncorroborated evidence of an accomplice; but they are not to be instructed, as matter of law, that the prisoner must in such case be acquitted." *People v. Costello*, 1 Denio, 83 (1845).

"The whole extent of the rule is this, that such testimony is of a suspicious character, and calls for scrutiny on the part of the jury, and for a particular caution to the jury on the part of the judge in his charge. The evidence, if standing alone, is not to be rejected, and whether corroborated or not, (and to what degree it needs corroboration the jury must judge), may be sufficient to satisfy the minds of the jury. So important however is it that the jury should be cautioned as to the weight of the evidence by the court, that to omit it is now held a clear omission of judicial duty, and becomes a ground, perhaps, for granting a new trial." *State v. Stebbins*, 29 Conn. 463, 473 (1861).

A witness does not become an accomplice by being charged with a similar offence. *U. S. v. Van Leuven*, 65 Fed. Rep. 78 (1894).

The question whether a witness is an accomplice may be left to the jury. *People v. Strybe*, (Cal.) 36 Pac. 3 (1894).

CORROBORATION REQUIRED. — In certain states the evidence of an accomplice must be corroborated. Such corroboration is frequently required by statute. *State v. Allen*, 57 Ia. 431 (1881); *Dunn v. State*, 15 Tex. App. 560 (1884); *Melton v. State*, 43 Ark. 367 (1884); *Vaughan v. State*, 58 Ark. 353 (1894); *Craft v. Com.*, 81 Ky. 250 (1883); *Evans v. State*, 78 Ga. 351 (1886); *State v. Streeter*, 20 Nev. 403 (1889); *People v. O'Neil*, 109 N. Y. 251 (1888); See also *R. v. Perry*, 1 Lower Can. Law Journal, 60 (1864).

Slight evidence identifying the defendant with the crime, after the *corpus delicti* has been proved, will be a sufficient corroboration of the evidence of an accomplice. *Evans v. State*, 78 Ga. 351 (1886).

WHAT IS CORROBORATION? "But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, could always furnish materials for the corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail or what room in the jail he had been confined, he might easily get confirmation of all these particulars. But these circumstances having no necessary connexion with the guilt of the defendant, the proof of the correctness of the statement in relation to them, would not conduce to prove that a statement of the guilt of the defendant was true." *Com. v. Bosworth*, 22 Pick. 397 (1839). "The accuracy of this statement has never been questioned, and, 'Taking the whole paragraph together,' says Chief Justice Gray in *Commonwealth v. Holmes*, 127 Mass. 424, 'it is manifest that the phrase 'material to the issue' is used as equivalent to 'involving the guilt of the party on trial,' or 'having necessary connection with the guilt of the defendant.'"
Com. v. Chase, 147 Mass. 597 (1888).

Corroboration on immaterial points, therefore, does not satisfy the rule. *State v. Callahan*, 47 La. Ann. 444 (1895).

"But evidence which tends to prove the guilt of a defendant is sufficient by way of corroboration, although it does not directly confirm any particular fact stated by the accomplice." *Com. v. Chase*, 147 Mass. 597 (1888).

"The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner." *State v. Miller*, 97 No. C. 484 (1887). It is not however, essential that the corroboration shall be equivalent to the "swearing of one credible witness." *Clapp v. State*, 94 Tenn. 186 (1894).

One accomplice cannot corroborate another, merely by a correspondence in their stories. *Melton v. State*, 43 Ark. 367 (1884); *Phillips v. State*, 17 Tex. App. 169 (1884).

A confession by the accused, with proof of the *corpus delicti* is sufficient corroboration of the evidence of an accomplice. *Melton v. State*, 43 Ark. 367 (1884); *Patterson v. Com.*, 86 Ky. 313 (1887).

The jury are the sole judges as to the weight to be given corroborating evidence in states where such corroboration is required.

Crafts v. Com., 81 Ky. 250 (1883); *State v. Streeter*, 20 Nev. 403 (1889).

An attempt has been made to establish a distinction between cases of felony and those of misdemeanor: that corroboration is absolutely needed in cases of felony but may be dispensed with in the case of offenses of a less grade. "In felonies — crimes involving the deepest hue of depravity and moral turpitude — the testimony of an accomplice is more open to impeachment than in mere misdemeanors, or offenses of a less revolting character. In the former class of crimes, a jury ought, in no case, to convict on the uncorroborated evidence of an accomplice. There may be some rare exceptions to this rule, but as a general proposition it is well founded." *U. S. v. Harries*, 2 Bond, 311, 317 (1869).

A CAUSE FOR COMMENT. — While the jury are justified in convicting upon the uncorroborated evidence of an accomplice, it is frequently obvious that the incriminating witness is a much more despicable person, morally, than the one whom he accuses; adding, upon his own statement, to the guilt of a common crime the baseness of a self-serving treachery. These and similar considerations warrant and sometimes almost demand comment from the court. "It is competent for a jury to convict on the testimony of an accomplice alone. But the source of this testimony is so corrupt that it is deemed unsafe to rely upon, and the court always consider it their duty to advise a jury to acquit, where there is no evidence corroborative of the accomplice. Corroboration need not extend to the whole testimony of the accomplice; but it being shown that he has testified truly in some particulars, the jury may infer that he has in others. It is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks. Some fact should be proved by testimony, independent of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. To prove that the accomplice had told the truth in relation to irrelevant and immaterial matters which were known to everybody, would have no tendency to confirm his testimony involving the guilt of the party on trial." *Watson v. Com.* 95 Pa. St. 418, 424 (1880); *State v. Crab*, 121 Mo. 554 (1894).

"The source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the court ever consider it their duty to advise a jury to acquit where there is no evidence other than the uncorroborated testimony of an accomplice." *Com. v. Bosworth*, 22 Pick. 397 (1839).

The supreme court of Georgia after ruling that the legality of a conviction upon the uncorroborated evidence of an accomplice is "well settled as the law of this state," go on to say: — "It is, how-

ever, the almost universal practice of the Judges to instruct juries that they should be cautious in convicting upon the uncorroborated testimony of accomplices." *State v. Miller*, 97 N. C. 484 (1887).

"It is the practice in England, and probably in this country where judges are still entrusted with the duty of charging the jury on the facts as well as the law of the case, to advise juries to acquit where the prosecution rests on the sole and uncorroborated testimony of the accomplice. This practice, however, appears to depend somewhat upon the discretion of the judge. It will be found, upon examining the cases, that it is usually, if not exclusively, confined to cases where the prosecution is sought to be supported by the sole testimony of the accomplice, or where there is an entire absence of any other testimony tending to implicate the party on trial. In cases where there is testimony introduced for the purpose of corroborating the evidence of the accomplice, in a matter implicating the defendant, an instruction to the jury not to convict, unless they are satisfied that the statements of the accomplice are corroborated, is not usual. The strength of the corroborating evidence is left to the jury." *State v. Watson*, 31 Mo. 361 (1861).

It has been held in Upper Canada that it was not error to fail to caution the jury. "Such a witness stands in a situation differing from one whose general character is shewn to be bad; he is immediately connected with the crime, the subject of enquiry, and has an obvious interest in obtaining the conviction of those whom he represents to have acted with him in committing it, and therefore, I think it to be regretted that there should be an omission to submit his evidence to the jury, coupled with a caution which the practice and authority of the most eminent judges in England recommend. But after the case of the *Queen v. Stubbs*, it cannot be treated as a point of law, and if not, then it is not a ground to apply for a new trial, for it certainly is not a question of fact." *R. v. Beckwith*, 8 U. C. C. P. 274 (1859). So in other jurisdictions. *Porath v. State*, 90 Wis. 527 (1895). And such seems to be the general rule.

"The suspicion with which the testimony of accomplices is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or to advise." *Cheatham v. State*, 67 Miss. 335, 344 (1889). The caution should not be given when the accomplice testifies for the defendant. *Joseph v. State*, (Tex.) 30 S. W. 1067 (1895); *People v. O'Brien*, 96 Cal. 171 (1892).

CONTINUATION OF PART IV.

EVIDENCE SUBJECT TO SPECIAL RULES OF LAW.



CHAPTER III.

MATTERS REQUIRING TO BE EVIDENCED BY WRITINGS.

§ 972. In the present chapter will be considered briefly those matters which the law requires to be proved by the evidence afforded by a *written document* more or less formally executed. Writings are of two kinds, namely, (1) writings under seal, which are called "*deeds*," and (2) ordinary writings not under seal.

§§ 973-4. First, as to deeds. There are some transactions which are, by the Common Law, required to be evidenced by deed. The most important of such transactions are those which relate to *incorporeal rights*; all of which, whether they amount to an interest in land or not, lie in *grant*, and accordingly can be neither created, assigned, demised, nor surrendered, except by *deed*.¹ Such things as advowsons, ferries,² rents, profits à prendre, easements, and the like, are "*incorporeal rights*"; as, also, are interests in lands not in possession, like remainders, or reversions for life or years. The principle, which requires incorporeal rights to be evidenced by documents under seal, depends on the *nature* of the subject-matter, and not on the quality or amount of interest granted, transferred, or surrendered. Accordingly, a right of common (which is a profit à prendre), or a right of way (which is an easement or a right in nature of an easement), can no more be granted or conveyed for

¹ Wood v. Leadbitter, 1845; Hewlins v. Shippam, 1826; Co. Litt. 337 b, 338 a; 2 Shep. Touch. 300; 1 Wms. Saund. 236 a; Lyon v. Reed, 1844; Bird v. Higginson, 1837; Mayfield v. Robinson, 1845; Roffey v. Henderson, 1851. The better

opinion is that the cancellation or destruction of the deed will *not* draw after it the loss of the interest itself, even where it is one which is necessarily in writing. See Greenleaf on Ev. 15th edit. (1892), §§ 265 and 568.

² Mayfield v. Robinson, 1845.

life, for years, or even for days, without a deed, than in fee-simple.¹ So strict is this rule that even a ticket of admission to a theatre during a season, or to a grand-stand during races, affords no irrevocable title to the party purchasing it, who, after notice of revocation, can be removed by the owner of the premises, without any reason assigned, and without so much as the price of the ticket being returned; and whose only remedy, if any, is to bring an action, founded on a breach of contract, against the person who sold the ticket, or against those who authorised its sale.² And *any* mere personal licence of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal.³ Such privileges as those of hunting, fishing or shooting, *coupled with a right of taking away the game when killed*, are indeed profits à prendre, and as such can only be irrevocably granted by deed to a person and his assigns.⁴ But, although a parol demise of an incorporeal hereditament passes no estate, a grantor is entitled to recover from a grantee, who has actually occupied and enjoyed the thing so demised, such reasonable sum as the jury shall assess, for the latter's actual enjoyment.⁵

§ 975. Deeds are also in certain cases required as evidence to prove a transfer of personal property, the law as to which is, in substance, as follows:—A gift which is clearly⁶ proved to have been given in contemplation of death,⁷ is called a *donatio mortis causâ*, and unless made *bonâ fide* twelve months before the donor died must be accounted for at the Inland Revenue Office, and will be liable to probate duty.⁸ A mere verbal gift of such a nature, without actual delivery, passes no property to the donee;⁹ and this whether

¹ *Wood v. Leadbitter*, 1845 (Alderson, B.). See *Williams v. Morris*, 1841; *Perry v. Fitzhowe*, 1846.

² *Wood v. Leadbitter*, 1845; overruling *Taylor v. Waters*, 1817; and explaining *Webb v. Paternoster*, 1620; *Wood v. Lake*, 1751; and *Wood v. Manley*, 1839. See, also, *Taplin v. Florence*, 1851.

³ *Wood v. Leadbitter*, 1845; *Wickham v. Hawker*, 1840; *Thomas v. Sorrell* (undated).

⁴ *Doe v. Lock*, 1835; *Wickham v. Hawker*, 1840; recognized in *Durham & Sunderl. Rail. Co. v. Walker*

1842; *Bird v. Higginson*, 1837; *Barker v. Davis*, 1864.

⁵ *Bird v. Higginson*, 1837; *Thomas v. Fredericks*, 1847. See post, §§ 981—984, 1036, 1043.

⁶ See *M'Gonnell v. Murphy*, 1869 (Ir.).

⁷ *Cosnahan v. Grice*, 1862 (P. C.).

⁸ 44 V. c. 12 ("The Customs and Inland Revenue Act, 1881"), §§ 38, 39, as amended by 52 & 53 V. c. 7, § 11.

⁹ *Smith v. Smith*, 1733-4; *Bunn v. Markham*, 1841; *Powell v. Hellicar*, 1858; *M'Gonnell v. Murphy*,

the chattel was at the time of the gift in the actual possession of the donor or of the donee.¹ Moreover, the gift of a chattel *inter vivos*, whether made verbally or in writing without deed, is not binding, unless there be either an actual delivery of possession of the property,² or a declaration of trust respecting it.³ Neither will the courts substitute one of these modes of dealing for the other in order to effectuate the gift, when by so doing the real intentions of the donor would be defeated.⁴ No rule of equity, moreover, perfects an imperfect gift by such a contrivance, even in favour of a *bonâ fide* present by a husband to his wife. A gift such as that just referred to will, however, be deemed irrevocable, if effected by a declaration of trust, or if accompanied by delivery of possession,⁵ or possibly if followed by some statement or act on the part of the donee testifying his acquiescence in the gift.⁶ A similar gift, if made by deed, is, moreover, complete without any delivery by the donor or acceptance by the donee, until disclaimer by the latter;⁷ but such disclaimer may be by *parol*.⁸ An assignment of chattels for a valuable consideration by way of mortgage will be binding upon the parties, though made by instrument not under seal, and though unaccompanied by any actual or symbolical delivery.⁹

§ 976. Contracts made and acts done by corporations form another class of transactions, in general required by the common law to be evidenced by deed.¹⁰ The general rule of law is, that a corporation aggregate cannot express its will or do any act except under seal, and this rule (which may be traced to a remote antiquity) is founded on the assumption, that the concurrence of the whole body corporate in any particular act, can best be authenticated by the

1869 (Ir.). See *Moore v. Moore*, 1874; *Rolls v. Pearce*, 1877; *Austin v. Mead*, 1880 (Fry, J.).

¹ *Shower v. Pilck*, 1849.

² See *Kilpin v. Ratley*, 1892; *Cochrane v. Moore*, 1890.

³ *Milroy v. Lord*, 1862 (Turner, L.J.).

⁴ *Breton's Estate*, In re, 1881 (Hall, V.-C.).

⁵ See *Bourne v. Fosbrooke*, 1865.

⁶ Serjeant Manning's note, 1846, in 1 C. B. 381, n. (d), and note to same effect in 2 M. & Gr. 691, n. (a), 1842; cited by Parke, B., in *Flory v.*

Denny, 1852; questioning *Irons v. Smallpiece*, 1819.

⁷ *Id.*; *Siggers v. Evans*, 1855. See *Hobson v. Thellusson*, 1867.

⁸ *Id.*; *Shep. Touch.* 285.

⁹ *Flory v. Denny*, 1852.

¹⁰ *Arnold v. May*, of Poole, 1842; *May of Ludlow v. Charlton*, 1840; *Church v. Imp. Gas Light & Coke Co.*, 1838; *Paine v. Strand Union*, 1846; *Lamprell v. Billericay Union*, 1849. As to contracts made by the Metrop. Board of Works, see 18 & 19 V. c. 120 ("The Metropolis Management Act, 1855"), § 149.

affixing of the corporate seal to the document relating to such act.¹ Its common seal has, in the quaint phraseology of olden times, been termed "the hand and mouth of the corporation."² This rule has been discarded in the United States as highly impolitic, and is now almost entirely superseded in practice.³ In England, it has been described by one of our most accomplished judges as "a relic of barbarous antiquity,"⁴ but still partially holds its ground.

§ 977. The rule has, however, from the earliest traceable period, been subject to certain *exceptions*, which rest upon a principle of convenience, amounting almost to necessity,⁵ and which relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from their nature *do not admit of delay*.⁶ As said in a well-considered case,⁷—"A corporation which has a *head* may give a personal command and do small acts; as it may retain a servant. It may authorise another to drive away cattle damage feasant, or to make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters the head of the corporation seems, from the earliest times, to have been considered as delegated by the rest of the members to act for them."

§ 978. To the exceptions mentioned in the preceding case, a further class of exceptions must now be added. In the case⁸ from which a quotation has just been taken, it is remarked, that, "in modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on *trading speculations*; and where the nature of their constitution has

¹ *May. of Ludlow v. Charlton*, 1840 (Rolfe, B.); *Church v. Imp. Gas Light & Coke Co.*, 1838.

² *R. v. Bigg*, 1717, cited by Tindal, C.J., in *Gibson v. E. India Co.*, 1839. As to when a corporation may adopt a private seal, see ante, § 149.

³ See 2 Kent, Com. 289, citing *Bk. of Columbia v. Patterson*, 1813 (Am.). See, also, *Beverley v. Lincoln Gas Co.*, 1837, as reported 6 A. & E. 837, 838 (*Patteson, J.*).

⁴ *South of Irel. Colliery Co. v. Waddle*, 1869 (Cockburn, C.J.).

⁵ *Church v. Imp. Gas Light & Coke Co.*, 1838 (Ld. Denman), cited by Rolfe, B., in *May. of Ludlow v. Charlton*, 1840.

⁶ *Arnold v. May. of Poole*, 1842 (Tindal, C.J.); *De Grave v. May. of Monmouth*, 1830.

⁷ *May. of Ludlow v. Charlton*, 1840 (Rolfe, B.).

⁸ *Id.*

been such as to render the *drawing of bills*, or the *constant making of any particular sort of contracts necessary for the purposes of the corporation*, there the courts have held that they would imply in those, who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist."

§ 979. Moreover, though the observations last quoted only speak of *trading companies*, later decisions seem to show that they may now be stated to be generally applicable alike to all *corporations aggregate*, whenever the making of a certain description of contract is necessary and incidental to the purposes for which the corporation was created.¹ For modern decisions establish the following propositions: An action *will* lie against a gas company for meters sold to them,² and by them against the consumer, either for not accepting gas according to his agreement,³ or for the price of gas supplied to him;⁴ a colliery company which had verbally contracted with an engineer for the erection of machinery to work their mine, and had paid him part of the price, was permitted to recover damages for breach of this agreement;⁵ actions also lie against the guardians of the poor of an union⁶ for iron gates,⁷ for water-closets,⁸ or for coals,⁹ supplied for the union workhouse under parol contracts; an accountant, employed to audit the books of a poor-law union, can maintain an action for work done as against the guardians, although the contract was not under seal;¹⁰ a surgeon retained by the general manager of a railway to attend a servant of the company injured by an accident on the line can recover his charges, though only verbally engaged;¹¹ a parol contract by the directors of a chartered Navigation Company to

¹ *Clarke v. Cuckfield Union*, 1851-2 (Wightman, J., in an elaborate argument). See, also, *Nicholson v. Bradfield Union*, 1866; *Wells v. Kingston-upon-Hull*, 1875.

² *Beverley v. Lincoln Gas Light and Coke Co.*, 1837.

³ *Church v. Imp. Gas Light and Coke Co.*, 1838.

⁴ *City of Lond. Gas Light and Coke Co. v. Nicholls*, 1826.

⁵ *South of Irel. Colliery Co. v. Waddle*, 1869.

⁶ Who are constituted a corporation by "The Union and Parish Property Act, 1835" (5 & 6 W. 4,

c. 69, § 7).

⁷ *Sanders v. St. Neots' Union*, 1846. But see *Smart v. West Ham Union*, 1855.

⁸ *Clarke v. Cuckfield Union*, 1851-2. See *Pauling v. Lond. & N. West. Rail. Co.*, 1853.

⁹ *Nicholson v. Bradfield Union*, 1866.

¹⁰ *Haigh v. North Bierley Union*, 1858.

¹¹ *Walker v. Gt. West. Rail. Co.*, 1867, overruling *Cox v. Midl. Rail. Co.* 1849, so far as relates to the necessity of a sealed contract.

pay a person a certain salary in consideration of his going to Sydney and bringing home one of their ships, has been enforced as against the company, the plaintiff having performed his part of the agreement;¹ and the same company has recovered damages for ale bought for the use of the passengers on board one of their steam vessels, being unfit for use, though the agreement for the purchase was not under seal.²

§ 980. On the other hand, some contracts are considered *not* to be of such frequent occurrence, or of such small importance, or so essentially necessary for the purposes for which the corporations were respectively instituted, as to be taken out of the general rule requiring the contracts of corporations to be under seal.³ Amongst these are a contract with a *copper* mining company for a supply by them of *iron* rails;⁴ a contract with a water company for the supply to them of iron pipes;⁵ a contract for erecting engines and machinery for a water company;⁶ a contract with a railway company to execute extensive repairs on their permanent line of rails;⁷ a contract with guardians of the poor to make a map of the rateable property of a parish in the union;⁸ a contract with guardians to do some extra work in building a poor-house;⁹ and a contract with guardians for the engagement of a clerk to the master of a workhouse.¹⁰ Moreover, even before the East India Company ceased to be merchants, an allowance by them of a retiring pension to a military officer was held not to be recoverable in a court of law, unless granted by deed.¹¹

§ 981. Moreover, to render a corporation liable in tort for the acts of its servants it is not necessary that the authority of such

¹ *Henderson v. Austral. Roy. Mail St. Nav. Co.*, 1855. See, also, *Reuter v. Elect. Teleg. Co.*, 1856.

² *Austral. Roy. Mail St. Nav. Co. v. Marzetti*, 1855.

³ *Church v. Imp. Gas Light & Coke Co.*, 1838 (Ld. Denman, explaining *E. Lond. Waterw. Co. v. Bailey*, 1827). See, also, *Paine v. Strand Union*, 1846; *Ernest v. Nicholls*, 1857; *Lond. Dock Co. v. Sinnott*, 1857; *Prince of Wales Life Ass. Co. v. Harding*, 1858.

⁴ *Copper Miners' Co. v. Fox*, 1851.

⁵ *E. Lond. Waterw. Co. v. Bailey*, 1827 (explained (Ld. Denman) in *Church v. Imp. Gas Light & Coke*

Co., 1838), would seem now to be overruled. See ante, § 979, and n. ⁵.

⁶ *Homersham v. Wolverh. Waterw. Co.* 1851 (probably not law). See ante, § 979, and n. ⁵.

⁷ *Diggle v. Lond. & Blackwall Rail. Co.*, 1850. See, also, as to this case, ante, § 979, and n. ⁵.

⁸ *Paine v. Strand Union*, 1846.

⁹ *Lamprell v. Billericay Union*, 1849.

¹⁰ *Austin v. Guard. of Bethnal Green*, 1874.

¹¹ *Gibson v. E. India Co.*, 1839. See *Cope v. Thames Haven Dock & Rail. Co.*, 1849.

servants should be conferred by an instrument under seal;¹ and the rule requiring them to act by deed will not protect them, either where goods have been wrongly taken by their agent,² or from liability where they have wrongfully possessed themselves of money belonging to the plaintiff.³ This last exception rests on necessity; for a corporation would scarcely put its seal to a promise to return money wrongfully received, so that if a seal were necessary, the injured party would be without remedy. Conversely and consistently with this rule, it is held that a corporation may even be liable for a libel,⁴ or for a malicious prosecution,⁵ by its servants—although it can maintain an action for a libel affecting the corporate property, but cannot maintain one for a libel charging it with an offence—such as corruption—of which only the individuals constituting it can be guilty, and not the corporation itself in its corporate capacity.⁵

§ 981A. An action is clearly maintainable *by* a corporation,⁶ for the use and occupation of premises; and one is probably maintainable *against* it,⁷ whenever it has *actually* occupied the plaintiff's premises, although no demise under seal has been executed. This, however, seems to rest on the peculiar language and object of the statute enabling landlords to bring such a form of action,⁸ and does not extend to cases of mere constructive holding.⁹

¹ *East. Cos. Rail. Co. v. Broom*, 1851; *Whitfield v. S. East. Rail. Co.*, 1858. This was an action for a libel transmitted by telegraph from one station to another on the defendants' line of rails. See, also, *Green v. Lond. Gen. Omnibus Co.*, 1859; *Roe v. Birkenhead, Lanc. & Chesh. Junc. Rail. Co.*, 1851; *Goff v. Gt. North. Rail. Co.*, 1869; *Moore v. Metrop. Rail. Co.*, 1872; *Poulton v. Lond. & S. West. Rail. Co.*, 1867; *Stewart v. Anglo-Califor. Gold Mining Co.*, 1852; *Stevens v. Midl. Rail. Co. and Lander*, 1854.

² *Yarborough v. Bank of Engl.*, 1812.

³ *Hall v. May. of Swansea*, 1844.

⁴ In *Kelly v. Mid. G. W. Rail. Co.*, 1872 (Ir.), (*Whiteside, C.J.*), and in *Abrath v. N. E. Rail. Co.*, 1886, *Ld. Bramwell* in *H. L.* expressed grave doubts whether an action for malicious prosecution could be maintained against a corporation aggre-

gate. Notwithstanding this, it is believed that the general opinion is that such an action may be maintained, and it was so held (*Pollock, B.*) in *Kent v. Courage & Co.*, 1891. And see, also, *Bank of New South Wales v. Owston*, 1879, *P. C.*; and *Edwards v. Midl. Rail. Co.*, 1880 (*Fry, J.*).

⁵ *Mayor, &c. of Manchester v. Williams*, 1891.

⁶ *May. of Stafford v. Till*, 1827; *Dean and Ch. of Rochester v. Pierce*, 1808; *Southwark Bridge Co. v. Sills*, 1826; *May. of Carmarthen v. Lewis*, 1834. See *Doe v. Bold*, 1847.

⁷ *Finlay v. Bristol & Ex. Rail. Co.*, 1852; *Lowe v. Lond. & N. West. Rail. Co.*, 1852. See ante, § 974.

⁸ 11 G. 2, c. 19 ("The Distress for Rent Act, 1737"), § 14, amended by "The Statute Law Revision Act, 1888" (51 V. c. 3).

⁹ *Finlay v. Bristol & Ex. Rail. Co.*, 1852.

§ 982. The question has often been discussed, as to how far, in applying the rule by which its seal is generally required to contracts with corporations and its exceptions, a distinction can be recognised between *executed* and *executory* contracts.¹ The decisions on this subject are confessedly irreconcilable. Where the contract falls within one of the exceptions, and, consequently, need not be under seal, the corporation may, no doubt, equally sue or be sued upon the parol agreement, whether it be executed or be merely executory.² The question, however, is, what is the law, where a parol contract, which should have been under seal, has been *executed* by the one side before action brought, so that the other has received the whole benefit of the consideration for which it bargained?³ For example, can a corporate body, after having actually received goods ordered by its servants, refuse to pay for them on the technical pretext that no contract under seal has been executed? The old Court of Queen's Bench,—apparently shocked at the gross injustice that might be perpetrated were such a system of repudiation allowable, and peradventure, bearing in mind the sage apophthegm of a great judge of the last century, that corporations, having neither bodies to be kicked nor souls to be damned, are not wont to be over nice observers of either honour or honesty,—decided this question in the negative on several occasions.

§ 983. Accordingly, in an action against guardians of an union for the price of some gates erected at the poor-house under a parol order, the court just named not only (as already mentioned) overruled an objection that the order was not by deed, the work in question having, after completion, been adopted by the corporation for purposes connected with it,⁴ but in a subsequent action said: "To enforce an *executory* contract against a corporation, it might be necessary to show that it was by deed; but where the corporation have acted as upon an *executed* contract, it is to be presumed against them that everything has been done that was necessary

¹ See ante, § 974, and post, §§ 1036, 1043.

² *Church v. Imp. Gas Light & Coke Co.*, 1838; recognised in *Gibson v. East India Co.*, 1839; and in *Arnold v. May. of Poole*, 1842.

³ See *Eccles. Commiss. v. Merral*, 1869.

⁴ *Sanders v. St. Neots' Union*, 1846. See, also, *Clarke v. Cuckfield Union*, 1851-2; *Beverley v. Lincoln Gas, &c. Co.*, 1837; *De Grave v. May. of Monmouth*, 1830 (*Ld. Tenterden*); *Pauling v. Lond. & N. West. Rail. Co.*, 1853.

to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed; it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case.”¹

§ 983A. In the Chancery courts, too, corporations may be bound by acquiescence in a continuing contract.²

§ 984. On the other hand, the old Court of Exchequer more than once held that a corporation is not precluded from relying on the absence of a seal, when works have been *executed* under a parol contract, even though such works have received the approval of the corporation, which enjoyed the full benefit of them.³ And the old Common Pleas held that a solicitor, who had been appointed, but not under seal, by the mayor and town council of a borough to conduct suits, could not recover costs incurred in such suits.⁴

§ 985. Another instance in which the law requires that a transaction shall be evidenced *by deed* is where an agent is employed to execute a deed for his principal, for, in this case, the authority must be given by an instrument under seal.⁵ But such an instrument, or power of attorney, *transfers* no interest, the agent or attorney being merely put thereby in the place of the principal. The deed which the agent is authorised to execute must consequently be executed by the agent in the name and as the act of him who gave the power.⁶ Neither can a parol ratification, not amounting to a re-delivery,⁷ by the principal in a deed executed by his agent give validity to the deed, when the agent has not been

¹ Judgment in *Doe v. Taniere*, 1848. See, also, *Henderson v. Australian, &c. Nav. Co.*, 1855; *Australian, &c. Nav. Co. v. Marzetti*, 1855; *Reuter v. Elect. Teleg. Co.*, 1856.

² *Crook v. Corporation of Seaford*, 1871.

³ *Lamprell v. Billericay Union*, 1849. See, also, *Diggle v. Lond. & Blackwall Rail. Co.*, 1850; *Homer-sham v. Wolverh. Waterw. Co.*, 1851;

May. of Ludlow v. Charlton, 1840.

⁴ *Arnold v. May of Poole*, 1842. See, also, *Clemenshaw v. Corp. of Dublin*, 1875 (Ir.).

⁵ *Berkeley v. Hardy*, 1826; *White v. Cuyler*, 1795; *Steiglitz v. Eggington*, 1815; *Williams v. Walsby*, 1803; *Callaghan v. Pepper*, 1840 (Ir.).

⁶ *Hunter v. Parker*, 1840 (Parke, B.); *M'Ardle v. Irish Iodine Co.*, 1864 (Ir.).

⁷ *Tupper v. Foulkes*, 1861.

authorised to act by an instrument under seal;¹ though it seems that evidence of an express, if not of an implied, recognition or adoption of the deed by the principal, will, as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact.²

§ 986. There are, moreover, some cases in which deeds are rendered necessary by *statute law*. For example, transfers of shares in *companies incorporated by Act of Parliament* are, by the Companies Clauses Consolidation Act, 1845,³ required to be by deed duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form given by the Act, or to the like effect. But, singularly enough, there exists no provision requiring transfers of shares in companies *incorporated under the Joint Stock Companies Act*,⁴ to be made by deed.

§ 987-8. On the other hand, some exceptions have been created by statute to the common law rule which requires that the contracts of corporations shall be made by deed. Thus, with regard to the contracts of companies incorporated by Act of Parliament since its date, it is, by the Companies Clauses Consolidation Act, 1845,⁵ provided that “the powers which may be granted to any committee [of directors] to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows;—that is to say, With respect to any contract, which, if made between private persons, would be by law required to be in writing and under seal, such committee, or the directors, may make such contracts on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same: With respect to any contract, which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on behalf of the company in writing, signed by such

¹ *Hunter v. Parker*, 1840 (Parke, B.).

² *Tupper v. Foulkes*, 1861. But see *Ld. Gosford v. Robb*, 1845 (Ir.).

³ 8 & 9 V. c. 16, § 14. This Act regulates all companies which have

been incorporated by Act of Parliament since its date.

⁴ Such incorporation is now effected under 25 & 26 V. c. 89, 1st Sch. Table A, No. 9.

⁵ 8 & 9 V. c. 16, § 97.

committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same: With respect to any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same. And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only." Under the above section, it may, from the fact of sleepers having been actually received and used by a railway company, in pursuance of a contract made with an agent of the company upon certain terms, be inferred by a jury that the directors agreed on behalf of the company to accept the goods on the terms which had been so agreed.¹

§ 989. Another exception to the common law rule requiring the contracts of corporations to be under seal, arises in the case of contracts by joint-stock companies which have been registered under the Companies Acts.² These may be made in nearly the same manner as contracts by companies incorporated by Act of Parliament passed in or since 1845.² Special provisions, too, exist as to the making, accepting, or indorsing of promissory notes or

¹ *Pauling v. Lond. & N. West. Rail. Co.*, 1853.

² 25 & 26 V. c. 89. 30 & 31 V. c. 131, § 37 (adopting the repealed 19 & 20 V. c. 47, § 41), enacts, that "contracts on behalf of any company registered under the Act of 25 & 26 V. c. 89, may be made as follows; (that is to say,)

"(1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same

manner varied or discharged:

"(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

"(3.) Any contract which if made between private persons would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any per-

bills of exchange on account of such companies,¹ and also with respect to the execution abroad of deeds made on their behalf.² Moreover, the memoranda of association, by which joint-stock companies are incorporated, and the articles of association, by which the affairs of such companies may be regulated, are not required to be executed under seal; but after registration they become as binding as deeds on every shareholder who has signed them in the presence of a single attesting witness.³

§ 990. Returning to the consideration of instances in which particular evidence (by document or otherwise) of particular transactions is required by statute, the following further instances are to be noted.

§ 991. A *deed* was, by the Act to simplify the transfer of property,⁴ rendered necessary in all cases of partitions, exchanges, assignments, or surrenders in writing of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands,⁵ where the transfer has been effected between the *1st of January*,⁶ and the *1st of October*,⁷ 1845.

§ 992. It has, moreover, been enacted⁸ "that after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;" or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. It is further enacted,⁹ "that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an

son acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be." See *Eley v. The Positive Governm. &c. Co.*, 1875.

¹ 25 & 26 V. c. 89 ("The Companies Act, 1862"), § 47. See *Peruvian Rail. Co. v. Thames and Mersey Mar. Ins. Co.*, 1867.

² *Id.* § 55; 27 & 28 V. c. 19 ("The Companies Seals Act, 1864").

³ By 25 & 26 V. c. 89 ("The Companies Act, 1862"), §§ 11, 16.

⁴ 7 & 8 V. c. 76. This Act was, within a year of its passing, repealed by 8 & 9 V. c. 106 ("The Real Property Act, 1845").

⁵ 7 & 8 V. c. 76, §§ 3 and 4; *Burton v. Reeve*, 1847; *Doe v. Moffatt*, 1850.

⁶ 7 & 8 V. c. 76, § 13.

⁷ 8 & 9 V. c. 106 ("The Real Property Act, 1845"), § 1.

⁸ *Id.* § 2.

⁹ *Id.* § 3.

infant, shall be void at law, unless evidenced by deed; and that a *partition* and an *exchange* of any tenements or hereditaments not being copyhold,—and a *lease*, required by law to be in writing,¹ of any tenements or hereditaments,—and an *assignment of a chattel interest*, not being copyhold, in any tenements or hereditaments,—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st of October, 1845, shall also be *void* at law, unless made by *deed*: Provided always, that the said enactment, so far as the same relates to a release² or a surrender, shall not extend to Ireland.”

§ 993. This enactment is of little practical importance as to feoffments, partitions, exchanges, assignments, and surrenders, since, before its passing, transfers effecting these were almost invariably by deed. With respect, however, to *leases*, it has proved highly beneficial;³ for by requiring all demises for a period exceeding three years⁴ to be under seal, it has gradually diminished, and at last dried up, that fruitful source of litigation, which used to spring from the difficulty of distinguishing between an actual lease and an agreement for a lease. At present, if the instrument be not under seal, it operates only as an agreement for a lease;⁵ that is, either party may enforce its specific performance and turn it into a lease;⁶ but, in the event of this course not being pursued, the party taking possession of land under it is a mere tenant at will, liable to become, by the payment and acceptance of rent,⁷ a

¹ See post, § 1001.

² This is obviously a misprint for “lease;” but the blunder has been remedied by 23 & 24 V. c. 154, § 104, and Sched. B. (Ir.), which repeats, so far as Ireland is concerned, that part of § 3 of 8 & 9 V. c. 106, which relates to leases, assignments, and surrenders.

³ The statute does not apply to agreements for letting tolls of turnpike roads under 3 G. 4, c. 126, §§ 55, 57: *Shepherd v. Hodsman*, 1852, recognized (*Byles, J.*) in *Markham v. Standford*, 1863.

⁴ A lease for eighteen months, with

power to lessee, by giving a month's notice, to prolong the term for a further period of two years, is not within the meaning of the statute: *Hand v. Hall*, 1877, C. A.

⁵ *Parker v. Taswell*, 1858; *Bond v. Rosling*, 1861; *Rollason v. Leon*, 1862; *Tidey v. Mollett*, 1864; *Stranks v. St. John*, 1867.

⁶ *Parker v. Taswell*, 1858. But see *Wood v. Beard*, 1876.

⁷ See, further, as to the operation of this Act, *Davidson, Conc. Prec. of Convey.* 50—71; *Platt on Leases*, passim. See, also, post, §§ 1001, 1002.

tenant from year to year, and thenceforth to be subject to all those stipulations in the agreement which are applicable to such a tenancy.¹

§ 994. Although leases for any term exceeding three years are now void unless granted by deed, an equally formal instrument is not required for the purpose of confirming those leases, which are invalid by reason of some deviation from the terms of the power under which they were granted; for it is expressly enacted,² that the *confirmation*, which shall suffice to establish the validity of any such defective lease, “may be by memorandum or note in writing signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised.”

§ 995. By “The Public Health Act, 1875,” all contracts, “whereof the value or amount exceeds 50%,” which shall be made by an urban sanitary authority, *must* be in writing, and be sealed with the common seal of such authority.³ “The Public Health (Ireland) Act, 1878,” contains a similar clause.⁴

§ 995A. Debentures issued under the Mortgage Debenture Acts of 1865 and 1870 must be deeds.⁵

§ 996. Secondly.⁶ As regards writings not under seal. It is in many cases (for the most part by statute) required that certain transactions be in writing.

§ 997. Thus absolute assignments of debts and other choses in action must be made “by writing under the hand of the assignor.”⁷

¹ *Martin v. Smith*, 1874. See post, § 1001, ad fin.

² By 13 & 14 V. c. 17, § 3.

³ 38 & 39 V. c. 55, § 174, subs. 1. See *Hunt v. Wimbledon Local Bd.*, 1878; *Eaton v. Basker*, 1881; *Young v. Leamington, Corp. of*, 1883; *Att.-Gen. v. Gaskill*, 1882.

⁴ 41 & 42 V. c. 52, § 201, subs. 1, (Ir.).

⁵ 28 & 29 V. c. 78; 33 & 34 V. c. 20, § 15. But debentures, stock certificates to bearers, or annuity certificates issued in pursuance of “The Local Loans Act, 1875,” will, it seems, be valid, if duly signed, without the impression of any seal (38 & 39 V. c. 83, § 22). Under this

last Act, debentures, stock certificates, and annuity certificates, when respectively payable to bearer, are transferable by delivery (Id. §§ 5, 6, 7); while what are called “nominal securities” must be transferred “by *writing* in manner directed by the local authority” (Id.). Irrespective of the statute law, debentures under the seal of a corporation will not, as it seems, be regarded as promissory notes, or even as negotiable instruments, though they may be drawn in express terms as payable to bearer. *Crouch v. Crédit Foncier of Engl.*, 1873.

⁶ *Supra*, §§ 273-4.

⁷ As to what will amount to an

If express notice in writing of any such assignment be given to the debtor, trustee, or other person liable, such assignment will, from the date of the notice, transfer the legal right to the assignee.¹

§ 998. The assignment of a copyright of a book is, again, not valid unless it be in writing.² The law is the same as to an assignment of any patent, or of any copyright in a registered design or trade mark.³

§ 998A. The sale of a British *ship* or of any share therein, is also required⁴ to be in writing, it being enacted that “(1) a registered ship or a share therein (when disposed of to a person qualified to own a *British* ship) shall be transferred⁵ by bill of sale; (2) the bill of sale shall contain such description of the ship as is contained in the surveyor’s certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A. in the First Part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses.”⁶ This enactment⁷ applies as well to an executory contract for the sale, as to the absolute sale, of a ship.⁸ It renders an actual bill of sale necessary.⁹ Such bill of sale must usually be executed by the transferor himself, in the presence of a witness or witnesses.¹⁰ When a registered owner is desirous of

assignment of a debt, see *Buck v. Robson*, 1878; and to the assignment of a chose in action, see *Brice v. Bannister*, 1878; *Ex p. Hall, Re Whitting*, 1878; *Walker v. Bradford Old Bk.*, 1884. See, also, *Tancred v. Delagoa Bay Rail. Co.*, 1889.

¹ “The Judicature Act, 1873” (36 & 37 V. c. 66), § 25, subs. 6; 40 & 41 V. c. 57, § 28, subs. 6, (Ir.). See *Burlinson v. Hall*, 1884.

² *Leyland v. Stewart*, 1876; *Jewitt v. Eckhardt*, 1878 (Jessel, M.R.).

³ See 5 & 6 V. c. 45 (“The Copyright Act, 1842”); 46 & 47 V. c. 57 (“The Patents, Designs and Trade Marks Act, 1883”), § 87; amended by 51 & 52 V. c. 50, § 21, and cases cited in last note.

⁴ 57 & 58 V. c. 60 (“The Merchant Shipping Act, 1894”), § 24. This applies only to British ships. *Union Bk. of London v. Lenandon*, 1878.

⁵ As to how a ship may be *mortgaged*, and the effect on it of an unregistered mortgage, see *Keith v. Burrows*, 1876.

⁶ The bill of sale does not require a stamp: 54 & 55 V. c. 39 (“The Stamp Act, 1891”), Sched. tit. “General Exemptions (2).”

⁷ As to provisions formerly in force (8 & 9 V. c. 89, § 34), see *Duncan v. Tindal*, 1853; *Hughes v. Morris*, 1852; *McCalmont v. Rankin*, 1852.

⁸ *Batthyany v. Bouch*, 1881, where the Court declined to follow *Liverpool Borough Bk. v. Turner*, 1860. See also *Chapman v. Callis*, 1861; *Stapleton v. Haymen*, 1865.

⁹ Though under the old law any instrument in writing which recited the certificate of registry was sufficient: *Hunter v. Parker*, 1840 (*Parke, B.*).

¹⁰ See 57 & 58 V. c. 60 (“The Merchant Shipping Act, 1894”), § 24.

selling or mortgaging an interest in a ship at a place out of the country, the registrar can allow the power of sale or mortgage to be exercised on the registered owner's behalf by another person, previously mentioned by the owner to the registrar, and whose name has been entered by the latter on the register.¹ Lastly, it is at least doubtful whether any description of vessel used in navigation, not propelled by oars,² can be sold without a bill of sale, though boats under fifteen tons burthen might, prior to that date, have been transferred by parol,³ and though such vessels do not now require to be registered, if solely employed in river or coast navigation.⁴

§ 999. It is also required that an assignment of a policy of insurance be made by indorsement on the policy.⁵ The assignee under an assignment so made may sue on the policy in his own name.⁶ The statute, while furnishing a short form of indorsement,⁷ leaves it uncertain whether it must not be sealed as well as signed. An assignment under this Act may be made after a loss by the perils insured against.⁸ In practice the Act has been rendered unnecessary by those provisions of the Judicature Act which have been already set out.⁹

§ 1000. The most important of the Acts requiring the transactions specified in them to be in writing or by deed (as the case may be) is, however, the "*Statute of Frauds*," which has been extended to Ireland,¹⁰ and has also been enacted, generally in the same words, in nearly all the United States.¹¹ Lord Nottingham framed it with the

¹ See 57 & 58 Vict. c. 60 ("The Merchant Shipping Act, 1894"), §§ 39, 40. Formerly a ship might be transferred by an agent acting under a parol authority. But now the proper form must be used, and the directions in the certificate of registry strictly followed: *Orr v. Dickenson*, 1858; *Hunter v. Parker*, 1840.

² See § 742 of "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60), tit. "Ship"; and § 24.

³ *Benyon v. Cresswell*, 1848.

⁴ As to this, see 57 & 58 V. c. 60, § 2. See, also, *id.* §§ 3, 77, subs. 6; § 692, subs. 3; § 745, subs. 1E.

⁵ See "The Policies of Marine In-

surance Act, 1868" (31 & 32 V. c. 86), § 2.

⁶ *Id.* § 1.

⁷ *Id.* Sched. The form ends with the words "In witness whereof," &c.

⁸ *Lloyd v. Fleming*, 1872.

⁹ *Supra*, § 997.

¹⁰ By 7 W. 3, c. 12.

¹¹ 29 C. 2, c. 3 (which by "The Short Titles Act, 1892" (55 V. c. 10), legally received the title by which it is cited above). See, also, 4 Kent, Com. 95, and n. b (4th edit.). The Civ. Code of Louis. art. 2415, without adopting in terms the provisions of the Stat. of Frauds, declares generally, that all verbal sales of

assistance of Sir Leoline Jenkins and Lord Hale.¹ Its noble author declared that every line of it was *worth* a subsidy,²—and the present generation may add that every line of it has *cost* a subsidy.³ The⁴ rules of evidence contained in this statute, are, for the most part, well calculated for the exclusion of perjury, by requiring, in the cases there mentioned, some more satisfactory evidence than mere oral testimony affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they did not previously possess.⁵ Its policy is to impose such requisites upon private transfers of property, as, without being hindrances to fair transactions, may either be totally inconsistent with dishonest projects, or may tend to multiply the chances of detection.⁶ The scope of the present work will only allow a notice of the rules of evidence, which the statute has introduced.

§ 1001. By the provisions of the Statute of Frauds, as since amended, all *leases*, estates, and interests in lands,⁷ created by livery and seisin only,—that is by mere matter in pais, without deed,⁸—or by parol and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, have only the force and effect of estates at will; except leases for terms not exceeding three years at a rent amounting to two-thirds of the improved value.

immoveable property shall be void:
4 Kent, Com. 450, n. a (4th edit.).

¹ 3 Campbell's Lives of the Chancellors, 418.

² R. North's Life of Guildford, 209.

³ In *Doe v. Harris*, 1838, Ld. Denman speaks of the Statute of Frauds as "one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution."

⁴ Gr. Ev. § 262, almost verbatim.

⁵ 2 St. Ev. 472; *Bann v. Hughes* (in H. L. and undated, but between 1764 and 1797); *Barrell v. Trussell*, 1811.

⁶ Rob. on Frauds, Pref. xxii. A learned note, at p. 359 of the 15th edit. (1892) of Greenleaf, points out various systems of law in which the principle of the Statute of Frauds may be traced, and also that the

Roman law required written evidence in every one of the cases in which it is rendered necessary by the Statute of Frauds, citing N. De Lescut De Exam. Testium, 26 (Farinæ, Op. Tom. II., App. 243).

⁷ Prior to 1st January, 1845, when 7 & 8 V. c. 76, came into operation (see ante, § 991), various of these could be created by parol.

⁸ See per Patteson, J., and Ld. Denman, in *Cooch v. Goodman*, 1842.

⁹ The actual words of "The Statute of Frauds" (29 C. 2, c. 3, § 1), are that "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents

It seems, though the point is not wholly free from doubt, that the statute is not applicable to *demises under seal*; ¹ and consequently, that an indenture of lease for more than three years need not be signed. It has been said that the tenancy described as "*an estate at will*," must be construed as a tenancy from year to year; ² but this is not strictly accurate; since a party who enters under an agreement void by the statute is, in point of law, tenant at will at first, though, like any other tenant at will, he will be converted into a tenant from year to year, as soon as a rent measured by the year or portions of it has been paid and accepted. ³ In both characters he will be subject to such of the terms of the agreement as are not inconsistent with the species of tenancy which the law under the circumstances creates. ⁴ Therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation, ⁵ or that he shall paint in the seventh year of his tenancy, ⁶ or that he shall pay his rent in advance, ⁷ he will be liable to an action for a breach of any such stipulation, notwithstanding the agreement itself is made void by the statute.

§ 1002. Although a parol lease for a longer period than the Act

thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding." § 2 "excepts, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised." These provisions were enacted in § 1 of 7 W. 3, c. 12, Ir.; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154 (§§ 104, 105, and Sch. B. Ir.); and § 4 of the last-mentioned Act now regulates the law in Ireland, enacting that "every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for

any definite period of time, not being from year to year or any lesser period, shall be by deed executed, or note in writing signed, by the landlord, or his agent thereunto lawfully authorised in writing." See *Bayley v. M. of Conyngham*, 1863 (Ir.); *Chute v. Busteed*, 1862-3 (Ir.).

¹ *Aveline v. Whisson*, 1842; *Shep. Touch.* 56, n. 24; *Cooch v. Goodman*, 1842; *Cherry v. Heming*, 1849. *Contrà*, 2 Bl. Com. 306.

² *Clayton v. Blakey*, 1798 (Ld. Kenyon); 2 Smith, L. C. 118; *Berrey v. Lindley*, 1841 (Coltman and Maule, JJ.).

³ *Richardson v. Gifford*, 1834 (Parke, J.); 2 Smith, L. C. 110, 111.

⁴ *Berrey v. Lindley*, 1841 (Maule, J.); *Doe v. Bell*, 1793; *Arden v. Sullivan*, 1850. See *Tooker v. Smith*, 1857.

⁵ *Richardson v. Gifford*, 1834. See *Beale v. Sanders*, 1837; *Arden v. Sullivan*, 1850.

⁶ *Martin v. Smith*, 1874.

⁷ *Lee v. Smith*, 1854.

permits is inoperative as to its duration, still, if a tenant holds under it during the entire period, he may quit *without notice* at the expiration of the term contemplated by the void demise.¹ The term² of three years, for which a parol lease may be good, must, on the other hand, be computed from the date of the agreement; and a term of three years to commence in futuro will consequently not satisfy the statute.³ If a parol lease is made, to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it.⁴

§ 1003.⁵ By the *third* section of the same statute,⁶ no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, in messuages, manors, lands, tenements, or hereditaments, could,—prior to the first of January, 1845,⁷—be *assigned, granted, or surrendered*, unless by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or his agent authorised by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal,

¹ Berrey v. Lindley, 1841; Doe v. Stratton, 1828; Doe v. Moffatt, 1850; Tress v. Savage, 1854.

² Gr. Ev. § 263, in part.

³ Rawlins v. Turner, 1699.

⁴ Rob. on Frauds, 241—244.

⁵ Gr. Ev. § 264, in part.

⁶ “The Statute of Frauds” (29 C. 2, c. 3). 7 W. 3, c. 12, § 1, Ir. was to the like effect; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154, §§ 104, 105, and Sch. B., Ir. The law in Ireland is now contained in §§ 7 and 9 of the Act just cited. § 7 enacts, that “the estate or interest of any tenant under any lease or other contract of tenancy shall

not be *surrendered* otherwise than by a deed executed, or note in writing signed, by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law.” § 9 enacts, that “the estate or interest of any tenant in any lands under any lease or other contract of tenancy, shall be *assigned, granted, or transmitted* by deed executed, or instrument in writing signed, by the party assigning or granting the same, or his agent thereto lawfully authorised in writing, or by devise, bequest, or act and operation of law, and not otherwise.”

⁷ When 7 & 8 V. c. 76, came into operation. See ante, §§ 991—993.

as advowsons, rents, and the like, and interests in lands not in possession, as remainders and reversions for life or years, lying in *grant*, could not, and still cannot, be surrendered except by deed.¹ The effect of this section is not to dispense with any evidence required by the common law; but to add to its provisions somewhat of security, by requiring a new and a more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by words only, some note in writing, duly signed, is by the statute made essential to a valid surrender.²

§ 1004. This section does not contain,—like the first two sections of the Act,—any exception in favour of leases not exceeding the term of three years; and, consequently, it excludes alike parol assignments and parol surrenders of mere leases from year to year, though such leases have been created by verbal agreement.³ It seems, also, that a parol agreement by a lessee, for the transfer of his interest in a term not exceeding three years, which is intended to take effect as an *assignment*, and is invalid as such, cannot operate as an *underlease*.⁴ If, however, both parties *intend* to create the relation of landlord and tenant, the mere fact of the parol demise passing all the lessor's interest in the premises will not prevent it from operating as a lease, at least for some purposes.⁵ The lessor, therefore, under these special circumstances, may sue the lessee as for use and occupation during the entire term, even should such lessee quit the premises before its expiration;⁶ and this, too, although the lessor, in consequence of having no reversion, cannot distrain for the rent in arrear.⁷

§ 1005. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a precise meaning. Its most obvious application is, “to cases where the

¹ Co. Lit. 337 b, 338 a; 2 Shep. Touch. 330; 1 Wms. Saund. 236 a; Lyon v. Reed, 1844; ante, §§ 973-4.

² Rob. on Frauds, 248.

³ Botting v. Martin, 1808 (M'Donald, C.B.); Mollett v. Brayne, 1809 (Ld. Ellenborough); Thomson v. Wilson, 1818 (id.). See Doe v. Wells, 1839.

⁴ Barrett v. Rolfe, 1845; questioning Poultney v. Holmes, 1733-4.

⁵ Pollock v. Stacy, 1847; upholding Poultney v. Holmes, 1733-4. But see Beardman v. Wilson, 1868.

⁶ Pollock v. Stacy, 1847.

⁷ Parmenter v. Webber, 1818; Smith v. Mapleback, 1786.

owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be a tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainder-man; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor."¹ In all these cases no question of *intention* can arise. The surrender is not the result of intention, but is the act of the law, and it takes place independently, and even in spite of, intention the most express.²

§ 1006. Neither is it material, whether the new interest taken by the surrenderor, be or be not equivalent to that enjoyed under the surrendered term. Therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new demise for a shorter period, this will amount to a surrender of his original lease.³ The better opinion now is, that nothing short of an express demise will operate as a surrender of an existing lease,⁴ and the doctrine that a tenancy under a lease would be surrendered by operation of law, if the parties were to make a verbal agreement, for a sufficient consideration, that, instead of the existing term, there should be a tenancy from year to year at a different rent, or even a tenancy at

¹ *Lyon v. Reed*, 1844 (Parke, B.).

² *Id.*

³ *Mellow v. May*, 1601; recognised (Holroyd, J.) in *Hamerton v. Stead*,

1824; and (Lefroy, B.) in *Lynch v. Lynch*, 1843 (Ir.).

⁴ *Foquet v. Moor*, 1852; *Crowley v. Vitty*, 1852.

will,¹ has been much shaken. Still, it is not necessary that the new demise should in all events be incapable of being defeated. For example, if a lessee were to accept, *in accordance with his contract*, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass ab initio the actual interest contracted for, though that interest would be liable to be defeated at some future period.²

§ 1007. On the other hand, the acceptance of a *void* lease, which creates no new estate whatever,³ or even the acceptance of a *voidable* lease, which, being afterwards made void *contrary to the intention* of the parties, does not pass an interest *according to the contract*, will not operate as a surrender of a former lease.⁴ Nor will it make any difference whether the surrender be express or implied; for as was once observed,⁵ “In the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void, in case the grant should be made void.”

§ 1008. The mere fact of a tenant entering into an agreement to *purchase* the estate will not, moreover, work a surrender of his tenancy by operation of law; because such a contract contains an implied condition that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not.⁶ If,

¹ See cases cited in note³, last page.

² *Roe v. Abp. of York*, 1805; *Doe v. Bridges*, 1831; *Doe v. Poole*, 1848; *Fulmerston v. Steward*, 1554 (Bromley, C.J.); *Co. Lit.* 45 a; *Lloyd v. Gregory*, 1638; *Whitley v. Gough*, 1556-7.

³ *Roe v. Abp. of York*, 1805; explained (Abbott, C.J.) in *Hamerton v. Stead*, 1824; *Lynch v. Lynch*,

1843 (Ir.) (Lefroy, B.); *Wilson v. Sewell*, 1766; *Davison v. Stanley*, 1768 (Ld. Mansfield).

⁴ *Doe v. Poole*, 1848; *Doe v. Courtenay*, 1848.

⁵ *Doe v. Courtenay*, 1848; overruling *Doe v. Forwood*, 1842.

⁶ *Doe v. Stanion*, 1835; *Tarte v. Darby*, 1816.

however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant from its date was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate as a surrender of the former interest.¹ An agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law.²

§ 1009.³ The simple *cancellation* of a lease, even though both parties consent,⁴ cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and therefore, a surrender by cancellation, which is but a sign, is also taken away; though a symbolical surrender may perhaps be still recognised in certain cases as the basis of equitable relief.⁵ This rule seems equally to apply, whether the cancelled deed relates to things lying in livery, or to those which lie only in grant.⁶ Neither will the fact of the lease being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences may account for, or excuse, the non-production of the written surrender.⁷

§ 1010. Though the doctrine of surrender by operation of law was originally confined to cases where the tenant accepted from

¹ Doe v. Stanion, 1836, as reported 1 M. & W. 701.

² Donellan v. Read, 1832; Lambert v. Norris, 1837.

³ Gr. Ev. § 265, slightly.

⁴ Ld. Ward v. Lumley, 1860.

⁵ Magennis v. MacCullough (undated); Roe v. Abp. of York, 1805; Wootley v. Gregory, 1828; Bolton v. Bp. of Carlisle, 1793; Doe v.

Thomas, 1829; Walker v. Richardson, 1837; Natchbolt v. Porter, 1689, 4 Kent, Com. 104; Rob. on Frauds, 251, 252; id. 248, 249; Holbrook v. Tirrell, 1829.

⁶ Bolton v. Bp. of Carlisle, 1793; Walker v. Richardson, 1837.

⁷ Doe v. Thomas, 1829; Walker v. Richardson, 1837; ante, § 138.

his lessor a new interest, inconsistent with that which he previously had, it has been considerably extended by modern decisions. It is now applied, not only to the case where the second lease is granted to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger,¹ but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and third party concur in such act, and the former *actually gives up possession* in consequence of it.² For example, a demise by the lessor to a stranger, with the lessee's assent, coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, at least, if it be merely a chattel interest.³ Whether a similar doctrine would apply to a case where the former lessee had a freehold interest admits of doubt. The Irish Court of Exchequer⁴ held that it would, but that decision has been much shaken, if not overruled.⁵ But in the case of a leasehold interest, although a parol licence to quit, even when followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest;⁶ yet if the tenant, in pursuance of such a licence, gives up possession, and the landlord accepts it, the licence, coupled with the change of possession, will amount to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession.⁷

§ 1011. The modern extension of this doctrine of surrender, ex-

¹ Shep. Touch. 301; *Hamerton v. Stead*, 1824.

² *Thomas v. Cook*, 1818; *Stone v. Whiting*, 1817; *Dodd v. Acklom*, 1843; *Lynch v. Lynch*, 1843 (Ir.); *Walker v. Richardson*, 1837; *Davison v. Gent*, 1856; *Grimman v. Legge*, 1828; *Bees v. Williams*, 1835; *Graham v. Whichelo*, 1832; *Reeve v. Bird*, 1834; *Hall v. Burgess*, 1826; *Nickells v. Atherstone*, 1847; *M'Donnell v. Pope*, 1852.

³ Cases cited in last note. In *Doe v. Wood*, 1815, tenant from year to year having died, leaving his widow in possession, and A. having some time after taken out administration, the widow continued in possession paying rent within A.'s knowledge, without his objecting. It was held

that these facts did not amount to a surrender on A.'s part, by operation of law, and that A., on proof of deceased's tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

⁴ In *Lynch v. Lynch*, 1843 (Ir.).

⁵ By *Ld. St. Leonards in Creagh v. Blood*, 1845 (Ir.).

⁶ *Mollett v. Brayne*, 1809 (*Ld. Ellenborough*). See, also, *Doe v. Milward*, 1838, and *Johnstone v. Hudlestone*, 1825.

⁷ *Grimman v. Legge*, 1828; *Dodd v. Acklom*, 1843; *Phene v. Popplewell*, 1862; *Whitehead v. Clifford*, 1814. See *Cannan v. Hartley*, 1850; *Oastler v. Henderson*, 1877, C. A.

plained in the early part of the preceding section, was questioned by Lord Wensleydale, who suggested that the cases on which it apparently rests may be supported on the ground that the occupation of the premises by the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or compensation for use and occupation during the continuance of that occupation."¹ Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground.² But in the leading authority on the subject,³ this point was neither suggested in argument, nor alluded to by the court. Moreover, in a case,⁴ which was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their consent, had been substituted in their place by the landlord. And the old Courts of Queen's Bench⁵ and Exchequer⁶ both declared their dissent from the line of argument advanced by Lord Wensleydale, and confirmed the doctrine laid down in the leading case above referred to,³ that the rule rests on the tenants in fact, and voluntarily assenting to an actual change in the possession.

§ 1012. On the whole it is submitted that the rule is good law; and that, confined, as it is, to cases where an actual, and consequently a notorious, shifting of possession has occurred, no danger need be apprehended from its continuance. Its adoption, however, where reversions or incorporeal hereditaments, which pass only by deed, are disposed of, or its extension to cases where corporeal estates are dealt with by the consent of the tenant, but no actual change of possession takes place, would certainly let in all the dangers for avoiding which the statute was passed. In such cases Lord Wensleydale's observation that the application of the rule would very seriously affect titles to long terms of years has much force. In mortgage terms, for instance, it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person.⁷ However, as in such

¹ *Lyon v. Reed*, 1844.

² *Gore v. Wright*, 1838.

³ *Thomas v. Cook*, 1818.

⁴ *Lynch v. Lynch*, 1843 (Ir.).

⁵ *Nickells v. Atherstone*, 1847.

⁶ *Davison v. Gent*, 1856.

⁷ *Lyon v. Reed*, 1844.

cases the rule as to surrenders implied by operation does not at present apply,¹ nothing further need be said on the subject.

§ 1013. A surrender by operation of law may be effected under the provisions of particular Acts of Parliament. For instance, the Bankruptcy Acts empower² the trustee of a bankrupt lessee to relieve himself from all responsibility under the lease, by simply disclaiming it in writing under his hand,³ provided he do so with the leave⁴ of the Court of Bankruptcy, within twelve⁵ months after his appointment, and within twenty-eight days after the lessor has applied to him to decide whether he will disclaim or not; and upon the execution of such disclaimer⁶ the lease is deemed to have been surrendered on the date of the disclaimer, and the lessor is deemed to be a creditor of the bankrupt to the extent of any injury he may have sustained by the operation of this enactment, and he may prove the same as a debt under the bankruptcy.⁷ The trustee of a bankrupt may, in like manner, get rid of any shares or stock in companies, unprofitable contracts, or unsaleable property, which have passed to him under the Bankruptcy Act, and this, too, notwithstanding he may have taken possession of such property, or exercised any act of ownership over it.⁸ Somewhat similar provisions will also be found in "The Irish Bankrupt and Insolvent Act, 1857,"⁹ and "The Bankruptcy, Ireland, Amendment Act, 1872."¹⁰ Under the Building Societies Act, 1874, also, the society may indorse on any mortgage given to them by a member a receipt under their seal, and countersigned by the secretary or manager,

¹ *Lyon v. Reed*, 1844, as to estates lying in grant; *Doe v. Johnston*, 1825, as to the assent of the tenant, when not coupled with change of possession; recognized in *Dodd v. Acklom*, 1843. In *Walker v. Richardson*, 1837, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

² 46 & 47 V. c. 52, § 55.

³ A trustee who has taken possession of the leasehold property of the bankrupt cannot divest himself of personal liability to the landlord for the rent, except in the mode indicated in the text: In *re Solomon*, ex parte Dressler, 1878, C. A. See, also, *Wilson v. Wallani*, 1880; and *Lowrey v. Barker*, 1880, C. A.

⁴ Leave to disclaim is not required in all cases. See "Bankruptcy Rules, 1883," r. 232.

⁵ See 53 & 54 V. c. 71 ("The Bankruptcy Act, 1890"), § 13.

⁶ But this disclaimer will not affect the rights of third parties: Ex parte Walton, re Levy, 1881, C. A. See, also, 46 & 47 V. c. 52, § 55, subs. 2.

⁷ 46 & 47 V. c. 52, § 55 (amended by 53 & 54 V. c. 71, § 13), and § 56; In *re Hide*, 1871, C. A. A trustee, after disclaimer, cannot remove fixtures: In *re Lavies*, ex parte Stephens, 1877, C. A. See In *re Roberts*, ex parte Brook, 1879, C. A.

⁸ Id. §§ 55, 56.

⁹ 20 & 21 V. c. 60, §§ 271, 272, Ir.

¹⁰ 35 & 36 V. c. 58, §§ 97, 98; Ir.

and such receipt will have the effect of vacating the security, and of vesting the property comprised therein in the party entitled to the equity of redemption, without any reconveyance.¹ "The Industrial and Provident Societies Act, 1893,"² and "The Friendly Societies Act, 1875,"³ contain similar enactments.

§ 1014. The law no longer allows any *merger* by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.⁴

§ 1015. *Assignments by operation of law* may be effected in a variety of ways. For instance, when a lessor owner in fee dies intestate, the reversion vests in his heir at law, and when a lessee dies intestate, the lease vests in his administrator, by operation of law. Nay, as against himself, even an executor de son tort may be treated as the assignee of a lease. In all these cases, when an action is brought against the heir, or administrator, or executor de son tort, it will probably be sufficient to charge in the statement of claim that the reversion or lease respectively came to the defendant "by assignment thereof then made."⁵ And by the Conveyancing and Law of Property Act, 1881, an estate or interest of inheritance in any hereditaments on the death of the trustee or mortgagee, notwithstanding any testamentary disposition, vests, like a chattel real, in his legal personal representative.⁶ The chattels real of any woman married before the 27th of August, 1870,⁷ or even between that date and the 1st of January, 1883,⁸ may be said, in the absence of a settlement, to have been assigned to her husband by operation of law.⁹ Women married since the latter date are however entitled to hold as their separate estate all the real and personal property belonging to them at the time of marriage.¹⁰ When, too, a person is adjudged a *bankrupt*, his property, whether real or personal, in or out of England, present or future,

¹ 37 & 38 V. c. 42, § 42; Harvey v. Munic. &c. Building Soc., 1881, C. A.

² 56 & 57 V. c. 39, § 43.

³ 38 & 39 V. c. 60, § 16, subs. 7.

⁴ 36 & 37 V. c. 66 ("The Judicature Act, 1873"), § 25, subs. 4; 40 & 41 V. c. 57, § 28, subs. 4, Ir.

⁵ Paull v. Simpson, 1846; Derisley v. Custance, 1790.

⁶ 44 & 45 V. c. 41, § 30.

⁷ When "The Married Women's Property Act, 1870" (33 & 34 V. c. 93), came into operation.

⁸ When "The Married Women's Property Act, 1882" (45 & 46 V. c. 75), came into operation.

⁹ See Ashworth v. Outram, 1877, C. A.

¹⁰ 45 & 46 V. c. 75 ("The Married Women's Property Act, 1882"), §§ 1, 2.

vested or contingent,¹ becomes vested, without any deed of assignment or conveyance, in the trustee upon his appointment; ² and on the death, resignation, or removal of any such trustee, and the appointment of another in his stead, a similar vesting takes place.³ So, when the affairs of a debtor are being settled by composition, or scheme of arrangement, all his property vests in the trustee from the date of his appointment.⁴ In the same way, where an official receiver is removed, dies, or resigns, all estates, rights, and powers, vested in him, without any conveyance or transfer, vest in such official receiver as the Board of Trade may appoint.⁵ Under "The Friendly Societies Act, 1875," too, upon the death, resignation or removal of a trustee, the property vested in him vests in his successor without conveyance or assignment.⁶ Upon the appointment, again, of an administrator of a convict's property, all the estate of the convict therein becomes vested in such official,⁷ and remains so vested till the expiration of the sentence, when it reverts in the convict or his representative.⁸ In connection with this subject it may be noted, too, that though a parol assignment by a sheriff of leasehold premises, taken in execution under a *fiery facias*, is void at law, even where the assignee has entered and paid rent to the head landlord, and though the execution debtor consequently at law may still regain possession of the premises in an action to recover land against the assignee,⁹ there appears ground for contending that if the latter plead the facts by way of defence on equitable grounds, he may possibly be enabled to support the assignment and so defeat his opponent.

§ 1016.¹⁰ It is further required by the Statute of Frauds that the declaration or creation of *trusts* of land¹¹ shall be manifested by

¹ 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 168. See *Stanton v. Collier*, 1854; *Beckham v. Drake*, 1847-9, H. L.; *Rogers v. Spence*, 1846, H. L.; *Herbert v. Sayer*, 1844; *Jackson v. Burnham*, 1852.

² 46 & 47 V. c. 52, § 54. See, as to the Irish law, 20 & 21 V. c. 60, §§ 267, 268, Ir.

³ *Id.* § 54, subs. 3. See, as to the Irish law, 20 & 21 V. c. 60, §§ 267, 268, Ir.; 35 & 36 V. c. 58, § 121, r. 5, Ir.

⁴ See 53 & 54 V. c. 71 ("The Bank-

ruptcy Act, 1890"), § 3, subs. 17, and § 43 of "The Bankruptcy Act, 1883" (46 & 47 V. c. 52). See, as to the Irish law, 35 & 36 V. c. 58, § 91, Ir.

⁵ Bankruptcy Rules, 1886, r. 322, subs. 2.

⁶ 38 & 39 V. c. 60, § 16, subs. 4.

⁷ 33 & 34 V. c. 23 ("The Forfeiture Act, 1870"), § 10.

⁸ § 18.

⁹ *Doe v. Jones*, 1842.

¹⁰ Gr. Ev. § 266, in part.

¹¹ Trusts of personalty are not affected by the statute. *Greenleaf*

some writing, signed by the party "who is by law enabled to declare such trust;"¹ and that all grants and assignments of any such trust shall also be in writing, signed in the same manner.² The statute does not require that the trust itself should be created by writing; but only that it should be *manifested* by writing; plainly meaning that documentary evidence should be forthcoming, to prove first the existence, and next the nature of the trust.³ A letter acknowledging the trust, and *à fortiori*, an admission in an answer in Chancery, is therefore sufficient to satisfy the statute.⁴ An employment by a person of another to bid for him at an auction is within the statute.⁵ Declarations of trust otherwise than of land are not required to be so evidenced,⁶ and may be shown in various ways.⁷

§ 1017.⁸ *Resulting trusts*, which arise by implication of law, are specially excepted from the operation of the Act.⁹ Trusts of this nature may be reduced to three classes.

§ 1017A. The first class of resulting trusts is where an estate is purchased in the name of one person, but the purchase-money is

on Ev., 15th edit. (1892), note to § 266.

¹ These words refer to the *beneficial*, and not to the mere *legal* owner of the estate. *Tierney v. Wood*, 1854; *Kronheim v. Johnson*, 1877 (Fry, J.).

² By 29 C. 2, c. 3 ("The Statute of Frauds"), § 7, as amended by "The Statute Law Revision Act" (51 V. c. 3), "all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

By § 8, "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to

the contrary notwithstanding."

By § 9 "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect." See the corresponding Irish Act of 7 W. 3, c. 12, §§ 10, 11, 12.

³ *Smith v. Matthews*, 1861 (Lds. JJ.). See *Booth v. Turle*, 1873; *Dye v. Dye*, 1884, C. A.

⁴ *Forster v. Hale*, 1798 (Ld. Alvanley); *Randall v. Morgan*, 1805; *Rob. on Frauds*, 95; *Sug. V. & P.* 700; 4 *Kent, Com.* 305.

⁵ *James v. Smith*, 1890.

⁶ See, as to these, notes as to executed and executory trusts to *Glenorchy v. Bosville*, 1733, 1 *White & Tudor, Lead. Cas.*, vol. i. p. 1; as to voluntary trusts, to *Ellison v. Ellison*, 1802, id. 291; as to constructive trusts, to *Keech v. Sandford*, 1776, id. 53; as to resulting trusts, to *Dyer v. Dyer*, 1788, id. 236.

⁷ *In re Vernon, Ewens & Co.*, 1886, C. A.

⁸ *Gr. Ev.* § 266, in part.

⁹ See n. 2, *supra*.

paid by another,¹—and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name, or in several, jointly or successive. In all such cases a trust will result to the man who advances the purchase-money,² unless such a resulting trust would break in upon the policy of some statute,³ or unless the purchase be effected by a father,⁴ or perhaps a mother,⁵ in the name of an unprovisioned child, legitimate or illegitimate,⁶ or in the joint names of the purchaser and such child,⁷ or of such child and another person.⁸ In the case of the purchase by a parent, the trust, in the absence of clear evidence to the contrary,⁹—and the parent's subsequent declarations cannot furnish such evidence,¹⁰—will not be deemed a resulting trust for the purchaser, but a gift or advancement for the child;¹¹ because parents are bound in conscience to provide for their children.¹²

§ 1017B. The second class of cases in which resulting trusts arise is where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it.

§ 1017C. The third class of resulting trusts arises in cases of fraud.¹³

§ 1018. In all cases of resulting trusts, parol evidence,—though received with great caution, and not deemed sufficient unless of a clear character,¹⁴—is admissible to establish the collateral facts (not

¹ *Lloyd v. Spillet*, 1740 (Ld. Hardwicke).

² *Dyer v. Dyer*, 1788 (Eyre, C.B.); Sug. V. & P. 701; *Wray v. Steele*, 1814; *Baxter v. Brown*, 1845.

³ *Ex parte Houghton*, 1810; *Redington v. Redington*, 1794.

⁴ The doctrine probably extends to a purchase by any person who stands in loco parentis, *Powys v. Mansfield*, 1836-7 (Ld. Cottenham).

⁵ But, in the case of a mother, the equitable presumption must be supported by some evidence of intention, *Bennet v. Bennet*, 1879 (Jessel, M.R.), commenting on *Sayre v. Hughes*, 1868 (Stuart, V.-C.); and *In re De Visme*, 1864.

⁶ *Beckford v. Beckford*, 1774; Sug.

V. & P. 703. See *Soar v. Foster*, 1758; *Tucker v. Burrow*, 1865 (Wood, V.-C.).

⁷ *Fox v. Fox*, 1863 (Ir.); *Sidmouth v. Sidmouth*, 1840.

⁸ *Lamplugh v. Lamplugh*, 1709.

⁹ *Stock v. M'Avoy*, 1872 (Wickens, V.-C.).

¹⁰ *O'Brien v. Sheil*, 1873 (Ir.).

¹¹ See *Forrest v. Forrest*, 1865; *Hepworth v. Hepworth*, 1870.

¹² Sug. V. & P. 703. See *Devoy v. Devoy*, 1858; *Jeans v. Cooke*, 1857; *Dumper v. Dumper*, 1862; *Williams v. Williams*, 1863.

¹³ *Lloyd v. Spillet*, 1740 (Ld. Hardwicke).

¹⁴ *Wilkins v. Stephens*, 1842; *Groves v. Groves*, 1829.

contradictory to the deed, unless in the case of fraud), from which a trust may legally result;¹ and it makes no difference as to its admissibility whether the nominal purchaser be living or dead.² It was, indeed, once doubted whether parol evidence is admissible against the answer of the trustee denying the trust.³ But there is no sufficient reason for such doubt.⁴ As a resulting trust may be established by parol evidence, it may also be rebutted by the same species of proof. Parol evidence will, therefore, be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially,⁵ and where circumstances render it probable that a gift was intended, the presumption of a resulting trust may be even rebutted by the sole testimony of the party interested in supporting the gift.⁶

§ 1019. § 4 of the Statute of Frauds,⁷ like § 1,⁸ would seem inapplicable to deeds.⁹ By it no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the *agreement*, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.¹⁰

§ 1020. The provisions of § 17 of the Statute of Frauds have

¹ *Marshal v. Crutwell*, 1875 (Jessel, M.R.).

² Sug. V. & P. 701, 702; 2 Story, Eq. Jur. § 1201, n.; *Lench v. Lench*, 1805; 3 Law Mag. 131—139; 4 Kent, Com. 305; *Boyd v. McLean*, 1815 (Am.); *Pritchard v. Brown*, 1828 (Am.); *Goodwin v. Hubbard*, 1818 (Am.).

³ Sug. V. & P. 702.

⁴ 3 Law Mag. 136—138; *Bartlett v. Pickersgill*, 1759-60 (Henley, L.K.).

⁵ Sug. V. & P. 702; *Edwards v. Edwards*, 1836; *Brady v. Cubitt*.

1778; *Beecher v. Major*, 1865; *Goodright v. Hodges*, 1773 (Buller, J.).

⁶ *Fowkes v. Pascoe*, 1875, C. A.

⁷ Viz., "The Statute of Frauds," or 29 C. 2, c. 3, as amended by "The Statute Law Revision Act, 1888" (51 V. c. 3); § 7 of 7 W. 3, c. 12, Ir., corresponds with this section.

⁸ Ante, § 1001.

⁹ *Cherry v. Heming*, 1849.

¹⁰ As to the meaning of these last words, see *Norris v. Cooke*, 1857 (Ir.); *Smith v. Webster*, 1876, C. A.

been repealed by "The Sale of Goods Act, 1893."¹ The last-mentioned Act provides² that a contract for the sale of any goods³ of the *value*⁴ of *ten pounds* or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party⁵ to be charged, or his agent⁶ in that behalf. It is expressly provided⁷ that these provisions of "The Sale of Goods Act, 1893," shall extend to every such contract, "notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

§ 1021. The meaning of § 4 of the Statute of Frauds is substantially the same⁸ as that of § 4 of "The Sale of Goods Act, 1893." To satisfy either enactment, the *consideration* for the *agreement* in the one case, and for the *bargain*⁹ in the other, must,

¹ 56 & 57 V. c. 71, § 60. § 21 of 7 W. 3, c. 12, Ir., corresponded with this section.

² 56 & 57 V. c. 71, § 4, subs. 1.

³ "The Statute of Frauds" here added, "wares or merchandize." By its interpretation clause (§ 62), the words "goods" in "The Sale of Goods Act, 1893," includes "all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

⁴ "The Statute of Frauds" here said, "*for the price* of ten pounds or upwards." The changed language is not important, in view of the change made by Lord Tenterden's Act as long ago as 1828, and subs. 2 of § 4.

⁵ A. signed a contract to buy a ship of B. B. altered the contract, signed it and returned it to A., who

thereupon assented by parol to the alteration, but did not re-sign. Held, that the statute was satisfied. *Steward v. Eddowes*, 1874.

⁶ One party to a contract cannot sign the name of the other as his agent, so as to bind him within the statute: *Sharman v. Brandt*, 1871, Ex. Ch. Neither, in the absence of express authority, can the vendor's traveller sign the bargain in the purchaser's name as his agent: *Murphy v. Boese*, 1875. See post, § 1109.

⁷ 56 & 57 V. c. 71, repealing (§ 60) and re-enacting (§ 4, subs. 2) a similar provision originally contained in Lord Tenterden's Act of 1828 (9 G. 4, c. 14, § 7), and extended to Ireland by § 21 of 7 W. 3, c. 12, Ir.

⁸ *Kenworthy v. Schofield*, 1824 (Bayley, J.).

⁹ *Egerton v. Mathews*, 1805, may appear at variance with this rule, but the bargain there, like all bargains for the purchase of goods, imported consideration on the face of it. See *Jenkins v. Reynolds*, 1821 (Park, J.); *Hunt v. Adams*, 1809 (Am.).

C. III.] CONSIDERATION MUST APPEAR IN SIGNED WRITING.

—except in the case of a special promise made by one person to answer for the debt, default, or miscarriage of another,¹—appear expressly or impliedly in writing signed by the party to be charged, or by his agent. This requirement applies, not only to bargains for the sale of goods, to agreements upon consideration of marriage,² to contracts for the sale or lease of lands, and to agreements not to be performed within a year;³ but also to special promises made by executors or administrators to answer damages out of their own estate. This doctrine is held with a view of effectuating the object of the statute. Instead, however, of preventing, it has, to a great extent, increased, the commission of fraud. Many of the States of America,⁴ influenced by these considerations, have repudiated it as highly impolitic; and some argue that the Legislature of this country should adopt similar views.

§ 1022—3. At present, however, the doctrine prevails in full force both in England and in Ireland (except as to guarantees⁵). But it is somewhat qualified by the further doctrine that the consideration need not be stated on the face of the written memorandum in *express* terms; but will sufficiently appear if it can be collected, not indeed by mere conjecture, however plausible,⁶ but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing.⁷

§ 1024. It is, however, essential to the validity of the written

¹ As to this, see 19 & 20 V. c. 97 ("The Mercantile Law Amendment Act, 1856"), § 3, cited post, § 1030B.

² See *Saunders v. Cramer*, 1842 (Ir.).

³ *Lees v. Whitcomb*, 1828; *Sykes v. Dixon*, 1839; *Sweet v. Lee*, 1841.

⁴ For example, it is stated (Gr. Ev. § 268, n.) that the English rule is followed in New York and New Hampshire, but that it has been rejected in Massachusetts, first by the State court, in *Packard v. Richardson*, 1821 (Am.), and subsequently by the Legislature of the State—the revised stat. c. 74, § 2, providing, that the consideration of the promise, contract, or agreement, need not be set forth in the writing signed by the party to be charged therewith, but may be proved by any other legal

evidence; that the rule is also rejected in Maine (*Levy v. Merrill*, 1826 (Am.)); in Connecticut (*Sage v. Wilcox*, 1826 (Am.)); in New Jersey (*Buckley v. Beardslee*, 1819 (Am.)); in North Carolina (*Miller v. Irvine*, 1834 (Am.)); and in South Carolina (*Fyler v. Givens*, 1835 (Am.)). The writer also refers to *Violett v. Patton*, 1809 (Am.); *Taylor v. Ross*, 1832 (Am.); 3 Kent, Com. 122.

⁵ As to which, see post, § 1030B.

⁶ *Hawes v. Armstrong*, 1835 (Tindal, C.J.); *James v. Williams*, 1834 (Patteson, J.); *Raikes v. Todd*, 1838 (Ld. Denman).

⁷ *Joint v. Mortyn*, 1823 (Ir.); *Saunders v. Cramer*, 1842 (Ir.); *Price v. Richardson*, 1845; *Caballero v. Slater*, 1854.

document, that all the material terms of the contract,¹ and the promise,² should be stated therein, either directly or by reference.³ For example, an agreement for a lease must contain all the essential terms of the lease; and therefore, if it cannot be discovered from it at what date the tenancy is to commence, the document will be rejected as not satisfying the requirements of the statute.⁴ Still, any memorandum will suffice, which, employing mere general language, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a man undertake in writing to purchase a particular article at a named price, this will satisfy the statute, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery.⁵ When, too, an auctioneer has signed a memorandum, acknowledging the receipt from A. B. of 21*l.* as deposit on *property* belonging to C. D., purchased at 420*l.* on a certain day at a named place, this is a sufficient description of a house that has been sold by auction, parol evidence being admissible to identify the particular premises;⁶ and if a party agree to pay rent for a certain farm at a specified sum per acre,⁷ or, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month, or even to liquidate his *debt*, the written memorandum need not specify the number of the acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry.⁸ In the last instance given the court will not presume the existence of more debts than one, but will call upon a party impeaching the document for uncertainty to furnish proof of that fact, and, in the absence of such proof, will apply the maxim, *de non apparentibus et de non*

¹ *Archer v. Baynes*, 1850; *Wood v. Midgley*, 1854; *Holmes v. Mitchell*, 1859.

² *Carroll v. Cowell*, 1838 (Ir.); *Morgan v. Sykes* (Ld. Abinger, C.B.), not reported, and undated, cited in *Coats v. Chaplin*, 1842.

³ "I admit that an agreement is not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject-matter of the contract, the consideration, and the

promise." *Tindal, C.J.*, in *Laythoarp v. Bryant*, 1836.

⁴ *Marshall v. Berridge*, 1882; *In re Lander and Bagley's Contract*, 1892.

⁵ *Sarl v. Bourdillon*, 1856.

⁶ *Shardlow v. Cotterill*, 1881, C. A.

⁷ *Shannon v. Bradstreet*, 1803 (Ir.) (Ld. Redesdale).

⁸ *Bateman v. Phillips*, 1812; *Shortrede v. Cheek*, 1834; *Bleakley v. Smith*, 1840. See post, § 1030.

existentibus eadem est ratio.¹ Moreover, the omission of the particular mode² or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale;³ and a written order for goods "on moderate terms" will satisfy the statute,⁴ though, if a specific price be agreed upon, it must be mentioned in the contract.⁵ But where a memorandum of a contract was void for omitting all reference to the price, plaintiff has been allowed to rely on part performance of the contract, and then to establish by parol evidence the price on which the parties had verbally agreed.⁶

§ 1025. The names of both contracting parties must, however, be specified in the memorandum⁷ either nominally, or by description, or by reference. But the courts show little inclination to enforce any strict rule on this point. For instance, in two sales of land by auction, where the particulars stated that the property was put up for sale "by direction of the proprietor," the requirements of the 4th section of the Act were held to be satisfied, so far as the description of the vendor was concerned.⁸ The same point has been ruled on other occasions, in which a description of the vendor as "the executor of Admiral F.,"⁹ or as "a trustee selling under a trust for sale,"¹⁰ or "landlord"¹¹ has been held to be under the circumstances sufficient. The description "owner" has also been held to be sufficient;¹² and so has the word "tenant," where it can reasonably be taken that one of the parties signed as such.¹³ And, under the Sale of Goods Act,¹⁴ if a defendant purchase various

¹ *Shelton v. Braithwaite*, 1841; *Shortrede v. Cheek*, 1834; *Dobell v. Hutchinson*, 1835; *Powell v. Dillon*, 1814 (Ir.); *Spickernell v. Hotham*, 1854.

² *Sarl v. Bourdillon*, 1856.

³ *Valpy v. Gibson*, 1847 (*Wilde, C.J.*).

⁴ *Ashcroft v. Morrin*, 1842.

⁵ *Elmore v. Kingscote*, 1826; *Goodman v. Griffiths*, 1857.

⁶ *Jeffcott v. North Brit. Oil Co.*, 1873 (Ir.).

⁷ *Champion v. Plummer*, 1805; *Vandenbergh v. Spooner*, 1866; *Williams v. Byrnes*, 1863; *Warner v. Willington*, 1856; *Wheeler v. Collier*, 1827 (Ld. Tenterden); *Skelton v. Cole*, 1857; *Williams v. Lake*, 1859; *Newell v. Radford*, 1867; *Boyce v.*

Green, 1826 (Ir.); *Williams v. Jordan*, 1877 (*Jessel, M.R.*).

⁸ *Rossiter v. Miller*, 1878, H. L.; *Sale v. Lambert*, 1874 (*Jessel, M.R.*). See, also, *Commings v. Scott*, 1875.

⁹ *Hood v. Ld. Barrington*, 1868.

¹⁰ *Catling v. King*, 1877, C. A.

¹¹ *Coombs v. Wilkes*, 1891. The cases above cited appear to dispose of a case in which it was decided that the mere term "vendor" was not a sufficient description: *Potter v. Duffield*, 1874 (*Romilly, M.R.*). See, also, *Thomas v. Brown*, 1876.

¹² *Butcher v. Nash*, 1889.

¹³ *Stobell v. Niven*, 1889, C. A.

¹⁴ § 4 (1) of "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), corresponds with § 17 of the Statute of Frauds.

articles in the plaintiff's shop, and sign his name and address to an entry in an "Order-book" which specifies the articles and the prices, the statute is satisfied if plaintiff's name is printed on the fly-leaf of the Order-book, where it may be seen if looked for.¹

§ 1026.² The written evidence rendered necessary by the Statute of Frauds and similar statutes, need not, however, be comprised in a single document, or be drawn up in any particular form. A draft, if duly signed, will suffice even where a more formal document was intended.³ It will suffice if the contract can be *plainly made out in all its terms from any writings of the party*,⁴ or even from his *correspondence*,⁵ provided such writings or correspondence contain internal evidence connecting them together.⁶ A signed letter will even be sufficient which does not contain in itself any one of the terms of the agreement if it distinctly refers to and recognises any writing which does contain them all.⁷ In such case the well-known maxim, "*verba illata inesse videntur*," will apply.⁸ A written memorandum, however, which in any material point differs from the terms of the verbal contract, or which either introduces any new term, or leaves any material term open to doubt,⁹ will not satisfy the requirements of the statute.¹⁰ Neither will a letter suffice, which, instead of ratifying, repudiates the written but unsigned contract relied on;¹¹ though a letter which enumerates all the essential terms of the bargain will be sufficient, notwith-

¹ *Sarl v. Bourdillon*, 1856.

² Gr. Ev. § 268, in part.

³ *Gray v. Smith*, 1890, C. A. But see *Bristol Aerated Bread Company v. Maggs*, 1890, C. A.; *Bolton v. Lambert*, 1889.

⁴ See *Shardlow v. Cotterill*, 1881, C. A.

⁵ *Bellamy v. Debenham*, 1891; *Allen v. Bennet*, 1810; *Jackson v. Lowe*, 1822; *Phillimore v. Barry*, 1808 (Ld. Ellenborough); *Warner v. Willington*, 1856; *Skelton v. Cole*, 1857; *Oliver v. Hunting*, 1890.

⁶ *Secus*, if not connected together. *Taylor v. Smith*, 1892, C. A.

⁷ *Dobell v. Hutchinson*, 1835; *Jones v. Victoria Graving Dock Co.*, 1877; *Gibson v. Holland*, 1865; *Macrory v. Scott*, 1850; *Ridgway v. Wharton*, 1856-7, H. L.; *Sug. V. & P.* 137; *Baumann v. James*, 1868; *Long v.*

Millar, 1878, C. A.; *Cave v. Hastings*, 1881; *Crane v. Powell*, 1868; *Oliver v. Hunting*, 1890. See post, § 1061. In *Stanley v. Dowdeswell*, 1874, the court was unusually astute in suggesting reasons why an answer to a letter was not a sufficient acceptance of an offer.

⁸ See per Parke, B., in *Llewellyn v. Ld. Jersey*, 1843.

⁹ In *Hussey v. Horne-Payne*, 1878, the C. A. held that a proposal to sell, accepted "subject to the title being approved," was no sufficient acceptance; but in H. L., 1879, this was questioned (Ld. Cairns).

¹⁰ *Mahalen v. Dublin & Chap. Distil. Co.*, 1877 (Ir.).

¹¹ *Archer v. Baynes*, 1850; *Richards v. Porter*, 1827; *Cooper v. Smith*, 1812. See *Goodman v. Griffiths*, 1857; *Jackson v. Oglander*, 1865.

standing it may also contain some reason for the non-acceptance of the goods, which form the subject-matter of the contract.¹ A simple acceptance by letter of a written offer to purchase may, indeed, constitute a contract to sell, although it refers to the preparation of a more formal contract; unless such reference be so expressed as to indicate an intention not to be bound by the bargain until the formal instrument be duly executed.² It must, however, be possible to collect the entire contract from the *writings*;³ verbal testimony not being admissible to supply any defects or omissions in the written evidence.⁴ Parol evidence may, nevertheless, be admitted to show the situation of the parties at the time the contract was made;⁵ to identify any plans or other documents or things referred to in the contract;⁶ or to explain the language employed,⁷ or, it seems, even to fix the date at which it was committed to writing.⁸

§ 1027. It does not, moreover, signify to whom the memorandum which states the terms of the agreement is addressed, because a memorandum is not necessary to *constitute* the contract, but merely to furnish satisfactory *proof* of it. Therefore, a letter addressed to a third party,⁹ or a recital of the arrangement contained in the will of the party to be charged,¹⁰ or an answer to a bill in Chancery under the old forms of pleading, or an affidavit in any legal proceeding,¹¹ or written and signed instructions given to a telegraph

¹ *Bailey v. Sweeting*, 1861; *Wilkinson v. Evans*, 1866; *Buxton v. Rust*, 1872; *Leather Cloth Co. v. Hieronimus*, 1875; *Munday v. Asprey*, 1880; *Elliott v. Dean*, 1884 (*Smith, J.*).

² *Bonnewell v. Jenkins*, 1878, C. A.; *Crossley v. Maycock*, 1874 (*Jessel, M. R.*); *Rossiter v. Miller*, 1878, H. L.; *Brien v. Swainson*, 1877 (*Ir.*); *Lewis v. Brass*, 1878, C. A.

³ *Chinnoek v. Lady Ely*, 1865; *Winn v. Bull*, 1877; *Rishton v. Whatmore*, 1878; *Dolling v. Evans*, 1867; *Nesham v. Selby*, 1872; *Peirce v. Corf*, 1874.

⁴ *Boydell v. Drummond*, 1809; *Cox v. Middleton*, 1855; *Ridgway v. Wharton*, 1854; *Caddick v. Skidmore*, 1858 (*Ld. Cranworth*); *Fitzmaurice v. Bayley*, 1857, Ex. Ch.;

Clarke v. Fuller, 1864; *Parkhurst v. Van Cortlandt*, 1814; *Abeel v. Radcliff*, 1816 (Am.).

⁵ *Sweet v. Lee*, 1841 (*Tindal, C. J.*).

⁶ *Horsfall v. Hodges*, 1824 (*Sir J. Leach*); *Cave v. Hastings*, 1881.

⁷ *Sweet v. Lee*, 1841. See *Waldron v. Jacob*, 1871 (*Ir.*), where parol evidence was admitted to show what "this place" meant.

⁸ *Edmunds v. Downes*, 1834; *Hartley v. Wharton*, 1840; *Lobb v. Stanley*, 1844.

⁹ *Longfellow v. Williams*, 1804 (*Lawrence, J.*); *Rose v. Cunyng-hame*, 1805; *Gibson v. Holland*, 1865.

¹⁰ *In re Hoyle*, *Hoyle v. Hoyle*, 1892, C. A.

¹¹ *Barkworth v. Young*, 1857.

clerk for transmission,¹ or the minutes of a board meeting, signed by the chairman ;² will suffice, provided the documents sufficiently refer to the terms of the original verbal promise ; and, indeed, even the attestation by the party to be charged of a deed which recites the oral agreement is sufficient, if it appear that he in fact knew of the recital.³ A written memorandum, made after the action is brought, will not, however, satisfy the statute.⁴

§ 1028. The *place of signature* is likewise immaterial when a statute merely requires that a writing should be *signed* by the party, and not that it should be *subscribed*. Therefore, if a party, or his duly authorised agent,⁵ insert his name, either at the beginning, or in the body, of a document, for the purpose of authenticating or governing every part of it, this will be equally valid with a signature at the foot.⁶ But in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by a document as it stood, or whether it was left so unsigned because he refused to complete it.⁷ Consequently, where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both of them in the body of the instrument, but concluded “As witness our hands,” and no signatures were subscribed, it was held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot.⁸

§ 1029. With respect, again, to the *mode of signature*, it matters not whether the *Christian* name be set out at length or denoted by the initial, or omitted altogether.⁹ It seems, however, that the *sur-name* must be written at length, and that a letter signed by mere

¹ Godwin v. Francis, 1870. In America even a telegram sent by verbal instructions has been held to be sufficient. Dunning v. Roberts, 1862 (Am.).

² Jones v. Victoria Graving Dock Co., 1877.

³ Welford v. Beezley, 1747.

⁴ Bill v. Bament, 1841.

⁵ Evans v. Hoare, 1892.

⁶ Caton v. Caton, 1867, H. L.; Lobb v. Stanley, 1844; Johnson v. Dodgson, 1837 (Ld. Abinger); Durrell v. Evans, 1862; Knight

v. Crockford, 1794 (Eyre, C. J.); Lemayne v. Stanley, 1681; Ogilvie v. Foljambe, 1817; Saunderson v. Jackson, 1800 (Ld. Eldon); Hammersley v. Baron de Biel, 1845, H. L. (Ld. Cottenham); Holmes v. Mackrell, 1858; Bleakley v. Smith, 1840. See post, § 1075.

⁷ Johnson v. Dodgson, 1837 (Ld. Abinger).

⁸ Hubert v. Treherne, 1842.

⁹ Lobb v. Stanley, 1844; Ogilvie v. Foljambe, 1817.

initials of the party,¹ or subscribed, without signature, "by your affectionate mother,"² or the like, will not suffice. A *printed* signature has, too, been held sufficient where the party to be charged has written other parts of the memorandum, or has done other acts amounting to a recognition of his printed name.³ As before pointed out, even a telegram, if sent in the usual way by the party to be charged, and containing his name, would satisfy the Act.⁴ Again, it is generally unnecessary that the agreement or memorandum should be signed *by both parties*; for in most cases the statute only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded.⁵ If it be said that, unless the plaintiff also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that, if he has not done so, it is his own fault.⁶ Even a written and signed proposal accepted by parol will be sufficient,⁷ provided the offer be accepted in its entirety.⁸

§ 1030. These general observations apply to most of the Acts that render documentary proof necessary.

§ 1030A. It will now be convenient to notice briefly some of the transactions enumerated in the Statute of Frauds which seem to require explanation.

§ 1030B. First, then, as to *guarantees*.⁹ The law as to these

¹ *Hübert v. Moreau*, 1826; *Sweet v. Lee*, 1841.

² *Selby v. Selby*, 1817 (Sir W. Grant).

³ *Schneider v. Norris*, 1814; *Saunders v. Jackson*, 1800; *Tourret v. Cripps*, 1879.

⁴ See *supra*, § 1027.

⁵ *Laythoarp v. Bryant*, 1836; *Liverpool Borough Bk. v. Eccles*, 1859; *Seton v. Slade*, 1802 (Ld. Eldon); *Egerton v. Mathews*, 1805; *Allen v. Bennet*, 1810. The last two cases were decisions on § 17 of the Stat. of Frauds (now § 4 of "The Sale of Goods Act, 1893"), which uses the word *parties*. They overrule the dicta of Ld. Redesdale and Sir T. Plumer in *Lawrenson v. Butler*, 1802 (Ir.); and *O'Rourke v. Perceval*, 1811 (Ir.). See 3 M. & Gr.

462, n., 1841, and 2 Kent, Com. 510. As to when a covenantor may sue for a breach of covenant, although he has not executed the deed, see *Wetherell v. Langston*, 1847; *Pitman v. Woodbury*, 1848; *Brit. Emp. Ass. Co. v. Browne*, 1852; *Morgan v. Pike*, 1854; *Swatman v. Ambler*, 1852.

⁶ *Laythoarp v. Bryant*, 1836 (Tindal, C.J.).

⁷ *Cresswell, J.*, in *Asheroft v. Morrin*, 1842; *Watts v. Ainsworth*, 1862; *Smith v. Neale*, 1857; *Peek v. N. Staffords. Rail. Co.*, 1849; *Warner v. Willington*, 1856; *Reuss v. Picksley*, 1866.

⁸ See *Forster v. Rowland*, 1861.

⁹ Guarantees must now be in writing under the Scotch law. See 19 & 20 V. c. 60, § 6.

was materially altered by the Mercantile Law Amendment Act of 1856.¹ Prior to the 29th of July, 1856, a guarantee—like other agreements, which the Statute of Frauds requires to be in writing,²—was invalid, unless the consideration for the promise was expressly set forth in the document, or at least could be implied therefrom. Gross injustice was caused by this rule, and accordingly a clause was inserted in the Act just cited,³ enacting, that “no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.” This provision is silent as to what the result of the needless insertion in the memorandum of a *past* or other legally insufficient consideration would be. In such a case would the courts admit parol evidence to contradict or vary the terms of the written document, by showing that the real consideration for the promise was other than that stated? ⁴ Further, although parol evidence is by the statute admissible to supply the consideration, it cannot be received now, any more than formerly, to *explain* the promise.⁵

§ 1031. The main difficulty in the law as to guarantees is to distinguish between *original* and *collateral* promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event of the other party making default.⁶ This is a question of fact for the jury on which it is not possible to lay down any precise rule of construction. In general, cases of this kind must separately be

¹ 19 & 20 V. c. 97.

² Ante, § 1021.

³ § 3 of the Act.

⁴ See post, § 1197, ad fin.

⁵ Holmes v. Mitchell, 1859.

⁶ Birkmyr v. Darnell, 1704; Forth v. Stanton, 1668; Barrett v. Hyndman, 1840 (Ir.); Fitzgerald v. Dressler, 1859; Mallett v. Bateman, 1865. See Orrell v. Coppock, 1857.

determined on their own merits;¹ it being remembered that original promises will be valid, though verbally made,² while collateral promises must be in writing in order to satisfy the statute.³ Both in England and America, moreover, agreements by factors to sell upon *del credere* commission, are held not to fall within the fourth section of the Statute of Frauds, or to be required to be in writing.⁴

§ 1032. Further, as to fall within the Statute of Frauds (§ 4) the promise must be one "to answer for the debt, default, or miscarriage of another,"⁵ the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a written document.⁶ Therefore a promise by a defendant to pay the debt if a plaintiff will discharge out of custody a debtor taken on a *ca. sa.*, is an original one which need not be in writing; for the moment the debtor is discharged *his* liability is at an end;⁷ where, too, a creditor had issued execution against a debtor, an arrangement, with the assent of all parties, that the debtor should convey his property to a third party, who undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, was held not to be within the statute, since its effect was to discharge the original debtor;⁸ while a promise by A. to B. to pay him a certain sum if he withdrew his record in an action against C. for assault and battery, is likewise an original one.⁹

§ 1033. On the other hand, a promise which contemplates that the original debtor's liability should be kept falls within the statute. This, for example, was held to be the case where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the

¹ 1 Wms. Saund. 211 b; 1 Smith, L. C. 334.

² Unless for the sale of goods for the price of 10*l.* or upwards. See ante, § 1020.

³ See *Lakeman v. Mountstephen*, 1874, H. L.

⁴ *Couturier v. Hastie*, 1852; *Wickham v. Wickham*, 1855 (Wood, V.-C.); *Wolff v. Koppel*, 1843 (Am.).

⁵ As to the meaning of these words, see *Macrory v. Scott*, 1850.

⁶ See *Gull v. Lindsay*, 1849.

⁷ *Goodman v. Chase*, 1818; *Butcher v. Steuart*, 1843; *Lane v. Burghart*, 1841. See *Reader v. Kingham*, 1862.

⁸ *Bird v. Gammon*, 1837.

⁹ *Read v. Nash*, 1751; recognized in *Bird v. Gammon*, 1837, as reported 3 Bing. N. C. 889; but questioned and said to be in effect overruled by *Kirkham v. Marter*, 1819. See 1 Wms. Saund. (1871 edit.), p. 231.

defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid;¹ and where a plaintiff, his attorney, and a defendant agreed (leaving the attorney still at liberty to recover his costs), that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff.² Even a promise to answer for the debt of another person, who himself never becomes legally indebted to the promisee, is possibly within the Act, if, at the time of the making of the promise, both parties intended that a contract of suretyship should be created.³ Moreover, it makes no difference whether the goods were delivered to the third party,⁴ or the debt incurred, or the default committed by him, *before* or *after* the promise by the defendant; for a promise to *indemnify*, if not within the words, is at least within the spirit, of the statute. Consequently, where the language is, in effect, this:—"If you will become bail in a civil suit for A., and he forfeits his bail bond, I will save you harmless," it is a promise to answer for the default of another.⁵ A promise by a man to indemnify another against all liability, if he will enter into recognizances for the appearance of a misdemeanant, as relating to a *criminal* proceeding, does not, however, fall within the Statute of Frauds.⁶

§ 1034. The statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach of *contract*. Therefore, where A. had killed plaintiff's horse, a third party's verbal promise to pay the damage, in consideration of plaintiff's forbearing to sue A., was held void.⁷

§ 1034A. Where an entire promise is invalid as to a part for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void.⁸

§ 1034B. A promise to him to pay the promisee's own debt to a

¹ Lane v. Burghart, 1841.

² Tomlinson v. Gell, 1837.

³ See Mountstephen v. Lakeman, 1874, H. L. (Ld. Selborne), disputing the proposition in the text.

⁴ Matson v. Wharam, 1787; Anderson v. Hayman, 1789.

⁵ Green v. Cresswell, 1839, over-

ruling dicta of Bayley and Parke, JJ., in Thomas v. Cook, 1828; and explaining Adams v. Dansey, 1830.

⁶ Cripps v. Hartnoll, 1863.

⁷ Kirkham v. Marter, 1819.

⁸ Lexington v. Clark, 1690; Chater v. Beckett, 1797; Thomas v. Williams, 1830; Mechelen v. Wallace, 1837.

third person need not be in writing, for the Act merely applies to a promise to be answerable for a debt of, or a default in some duty by, some *other* person *towards the promisee*.¹

§ 1035. The provision in the Statute of Frauds (§ 4), requiring "*agreements made in consideration of marriage*" to be in writing, does not embrace mutual promises to marry; but such promises may be verbally made.² But marriage is not a "part performance" of a contract³ within the general rule of equity that a contract void by statute will be enforced if it be a *complete* agreement,⁴ of which there has been such a part performance on the side of the plaintiff that it would be a fraud on him if the defendant could object that the agreement was not in writing.⁵ Therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady marries him, relying on his honour, she cannot compel the performance of his agreement.⁶ Neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement previously made by her father with reference to settlements.⁷ At the same time, in the event of a clear case of fraud being established, the court, notwithstanding the Act, would compel a father to perform verbal promises on the faith of which the marriage was contracted.⁸ If a father were to say to a suitor, "Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion," with a fraudulent intent to deceive him, it is possible that this proposal, though not reduced to writing, if the marriage were actually to take place, and the jointure were settled, would amount to a valid equitable contract to give the portion.⁹ Probably, too,

¹ *Eastwood v. Kenyon*, 1840; *Har- greaves v. Parsons*, 1844 (Parke, B.); *Thomas v. Cook*, 1828; *Reader v. Kingham*, 1862; *Wildes v. Dudlow*, 1875 (Malins, V.-C.).

² B. N. P. 280, c.

³ *Hammersley v. Baron de Biel*, 1845 (Ld. Cottenham); *Redding v. Wilks*, 1791; *Lassence v. Tierney*, 1849 (Ld. Cottenham); *Warden v. Jones*, 1857.

⁴ *Lady E. Thynne v. E. of Glen- gall*, 1847-8, H. L.

⁵ *Clinan v. Cooke*, 1802 (Ir.); *Kine v. Balfe*, 1813 (Ir.); *Surcome v. Pin- niger*, 1853; *Taylor v. Beech*, 1749;

Ungley v. Ungley, 1877, C. A.

⁶ *Montacute v. Maxwell*, 1720; *Caton v. Caton*, 1867, H. L.

⁷ *Dundas v. Duten*, 1790; *Goldi- cutt v. Townsend*, 1860.

⁸ *Baron de Biel v. Hammersley*, 1845, H. L. (Ld. Brougham).

⁹ *Hammersley v. Baron de Biel*, 1845, H. L. (Lds. Cottenham, Camp- bell, and Lyndhurst); *Williams v. Williams*, 1868 (Stuart, V.-C.). See, also, *Maunsell v. White*, 1854; *Bold v. Hutchinson*, 1855; *Jameson v. Stein*, 1855. See *Kay v. Crook*, 1857. But there must at all events be actual fraud. *Johnstone v. Mappin*, 1891;

though two recent cases throw some doubt upon the subject,¹ a verbal agreement made before marriage will be enforced, if subsequently to the marriage it has been recognised and adopted in writing.² The court, however, will not interfere, even in cases where there has been a written memorandum of the promise, unless it appears that the marriage was contracted expressly on the faith of the agreement.³ Therefore, a letter by a father to his daughter, saying that he had agreed with her intended husband to give her 3,000*l.* as her portion, which letter was never shown to the husband before the marriage, was held not to be sufficient, since the husband could not have married on the faith of the letter.⁴

§ 1036. The provision in the Statute of Frauds which renders void any agreement that is "*not to be performed within a year*" from the making thereof, which is not evidenced by writing, does not apply where the contract is *capable* of being wholly performed on the one side or on the other within a year.⁵ Neither does it extend to an agreement by a contractor to allow a stranger to share in the profits of a contract incapable of being completed within a year, since such an agreement amounts to nothing more than the vendition of a right which is performed instantaneously on the bargain being struck.⁶ It would also seem to be inapplicable in any case where the action is brought upon an *executed* consideration;⁷ since the object of the statute clearly being only to prevent the setting up, by fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives, its operation must be limited to such actions as are brought to recover damages for the *non-performance* of contracts, which are not intended to be completely performed on

¹ *Warden v. Jones*, 1857 (Ld. Cranworth, C.); *Trowell v. Shenton*, 1878 (Jessel, M.R.).

² *Barkworth v. Young*, 1857 (Kindersley, V.-C.); *Hammersley v. Baron de Biel*, 1845, H. L. (Ld. Cottenham, citing *Hodgson v. Hutcheson*, 1712); *Taylor v. Beech*, 1749; and *Montacute v. Maxwell*, 1732-3; and questioning *Randall v. Morgan*, 1805, where Sir W. Grant expressed serious doubt. See *Hammersley v. Baron de Biel*, 1845, as reported 12 Cl. & Fin. 86 (Ld. Brougham); and

De Biel v. Thomson, 1844, as reported 3 Beav. 475, 476 (Ld. Langdale). Also *Caton v. Caton*, 1867, C. A.

³ See *Viret v. Viret*, 1880 (Malins, V.-C.).

⁴ *Ayliffe v. Tracy*, 1722. See *Dashwood v. Jermyn*, 1879.

⁵ *Cherry v. Heming*, 1849; and *Smith v. Neale*, 1857; both recognising *Donellan v. Read*, 1832.

⁶ *M'Kay v. Rutherford*, 1848, P. C.

⁷ *Knowlman v. Bluett*, 1874. See ante, §§ 974, 981-984; post, § 1043.

C. III.] CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

either side within a year from the time of their being made.¹ Subject to this limitation, a *part-performance* is not sufficient to take the case out of the statute. Whenever it appears, either by express stipulation, or by inference from the circumstances, to have been contemplated that a contract could not be *completed* on either side within the year, documentary proof of such contract must be given.² Thus, a servant verbally hired for a year's service, *commencing at a future day*, cannot maintain an action against the master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge.³ But though no action can be brought on it, the parol agreement will not be void for all purposes; for the servant may, by a sufficient service under it, acquire a poor law settlement.⁴

§ 1037. A contract which expressly contemplates a duration of more than a year will not be taken out of the operation of the statute by the mere fact that it *may* be determined by the parties within the year.⁵ Therefore, a contract to employ a solicitor during his professional life is within the statute, though it may be determined in less time than a year by the lawyer's death, or retirement, or misconduct.⁶ And in such a case, it matters not whether it were made in this or in any other country; for, as the Act does not bar the right as well as the remedy, or in other words, does not render the agreement void, but only prevents its being enforced by action here, it applies to all foreign contracts equally with those entered into in England.⁷ But where an agreement is altogether silent as to the time within which it is to be per-

¹ *Souch v. Strawbridge*, 1846 (Tindal, C.J.). See *Re Pentreguinea Coal Co.*, 1862.

² *Boydell v. Drummond*, 1809.

³ *Bracegirdle v. Heald*, 1818; *Snelling v. Huntingfield*, 1834; *Britain v. Rossiter*, 1879, C. A.; *Giraud v. Richmond*, 1846. See *Cawthorne v. Cordrey*, 1863; *Banks v. Crossland*, 1874.

⁴ *Bracegirdle v. Heald*, 1818 (Bayley, J.).

⁵ *Birch v. Ld. Liverpool*, 1829; *Roberts v. Tucker*, 1849; *Dobson v. Collis*, 1856; *Re Pentreguinea Coal*

Co., 1862.

⁶ *Eley v. The Positive, &c. Co.*, 1875. For the rule of law here is the same as in the case of a defeasible estate, where, if a party enters, he is *in* of the whole estate, though an event may afterwards occur, which would prevent the estate from continuing during the entire term contemplated in the original grant. (*R. v. Herstmonceaux*, 1827 (Bayley, J.). See ante, §§ 1006—1008.)

⁷ *Leroux v. Brown*, 1852. But see *Williams v. Wheeler*, 1860 (Willes, J.).

formed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the giving of a notice, or the like, it is not within the operation of the statute, though the event, which is to terminate the agreement, does not in fact occur within the year.¹

§ 1038. The expression *interest in lands*, used in § 4 of the Statute of Frauds, has given rise to much litigation. It appears to extend to contracts to abate a tenant's rent;² to submit to arbitration the question whether a lease shall be granted;³ to relinquish a tenancy, and let another party into possession for the residue of a term;⁴ to permit the profits of a clergyman's living to be received by a trustee;⁵ to repay a loan out of the future rent of a farm;⁶ to become a partner in a colliery, which was to be demised by the partnership upon royalties;⁷ to assign a share in partnership assets which include an interest in land;⁸ to take furnished lodgings;⁹ or to exercise sporting rights over land, and carry off a portion of the game killed;¹⁰ to convey an equity of redemption;¹¹ or to procure, as a broker, the sale of a lease.¹² On the other hand, it appears the words "interest in land" do not extend to an equitable mortgage by deposit of title-deeds;¹³ a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises;¹⁴ a contract relating to the investigation of a title to land;¹⁵ an agreement for board and lodging, no particular rooms being demised;¹⁶ an agreement between a land-

¹ *Souch v. Strawbridge*, 1846; *Knowlman v. Bluett*, 1874; *Ridley v. Ridley*, 1865; *Wells v. Horton*, 1826; *Gilbert v. Sykes*, 1812; *Peter v. Compton*, 1693; *Fenton v. Emblers*, 1762. See *Mavor v. Payne*, 1825; *Murphy v. Sullivan*, 1866 (Ir.); *Farrington v. Donohue*, 1866 (Ir.); *Davey v. Shannon*, 1879 (Hawkins, J.).

² *O'Connor v. Spaight*, 1804 (Ir.).

³ *Walters v. Morgan*, 1792.

⁴ *Buttemere v. Hayes*, 1839; *Smith v. Tombs*, 1839; *Cocking v. Ward*, 1845; *Kelly v. Webster*, 1852; *Smart v. Harding*, 1855; *Hodgson v. Johnson*, 1859; *Ronayne v. Sherrard*, 1877 (Ir.).

⁵ *Alchin v. Hopkins*, 1834.

⁶ *Ex p. Hall, Re Whitting*, 1878, C. A.

⁷ *Caddick v. Skidmore*, 1857 (Ld. Cranworth, C.).

⁸ *Gray v. Smith*, 1890, C. A.

⁹ *Edge v. Strafford*, 1831; *Inman v. Stamp*, 1815 (Ld. Ellenborough); *Mechelen v. Wallace*, 1837; *Vaughan v. Hancock*, 1846.

¹⁰ *Webber v. Lee*, 1882, C. A.

¹¹ *Massey v. Johnson*, 1847 (Rolfé B.). See *Toppin v. Lomas*, 1855.

¹² *Horsev. v. Graham*, 1869.

¹³ *Russel v. Russel*, 1783.

¹⁴ *Hoby v. Roebuck*, 1816.

¹⁵ *Jeakes v. White*, 1851.

¹⁶ *Wright v. Stavert*, 1850.

lord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house;¹ an undertaking by a landlord to build a water-closet for his tenant;² or to put the house in repair and put more furniture into it;³ an agreement for the use of a graving dock during the repairs of a ship;⁴ or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his lands.⁵ How far the words in question make the Act apply to profits à prendre, easements, and other incorporeal rights relating to lands, is by no means clear; though they ought, on principle, to extend to all agreements respecting rights of common, rights of way, grants of rent-charge, tolls, or licences coupled with an interest, however trifling, in lands.⁶

§ 1039. The question, whether *shares* in a joint-stock company,⁷ possessed of *real estate*, were an interest in lands, was formerly much discussed.⁸ But it is now enacted that all shares issued either under the old Joint-Stock Companies Act of 1856, or under the present Companies Acts, "shall be personal estate, and shall not be of the nature of real estate."⁹ In many cases, too, where a company has been incorporated by statute, Parliament has expressly declared that the shares shall be deemed personal estate.¹⁰ Even in the absence of any such declaration, if a company be *incorporated* by statute or by charter, and real property be vested in it, of which it is to have the sole management, the shares of

¹ Hallen *v.* Runder, 1834; Lee *v.* Gaskell, 1876.

² Mann *v.* Nunn, 1874.

³ Angell *v.* Duke, 1875.

⁴ Wells *v.* Kingston-upon-Hull, 1875.

⁵ Gillanders *v.* Ld. Rossmore, 1835, Griffiths *v.* Jenkins, 1864 (Crompton and Shee, JJ.).

⁶ Cook *v.* Stearns, 1814 (Am.); R. *v.* Salisbury, 1838.

⁷ As to shares in an ordinary private partnership owning real estate, see Ashworth *v.* Munn, 1878, C. A.

⁸ Bligh *v.* Brent, 1836-7; Bradley *v.* Holdsworth, 1838; Hibblewhite *v.* M'Morine, 1840 (Parke, B.); Humble *v.* Mitchell, 1839; Baxter *v.* Brown, 1845 (Tindal, C.J.); Hilton *v.* Giraud,

1847; Watson *v.* Spratley, 1854 (Martin and Parke, B.B.); Bulmer *v.* Norris, 1860. See Edwards *v.* Hall, 1855; overruling Ware *v.* Cumberlege, 1855; and see, also, Powell *v.* Jessopp, 1856; and Taylor *v.* Linley, 1860.

⁹ 19 & 20 V. c. 47, § 15; 25 & 26 V. c. 89, § 22.

¹⁰ As, for instance, in the case of all companies subject to the provisions of "The Cos. Clauses Consolid. Act, 1845" (8 & 9 V. c. 16), § 7; in the case of the Lancaster Canal Co.; of the Lond. & Birmingham Rail. Co. (see Bradley *v.* Holdsworth, 1838); and of many others. Again, stock, to which "The Colonial Stock Act, 1877," applies, is personal estate (40 & 41 V. c. 59, § 22).

the individual proprietors will be personalty, and will consist of nothing more than a right to participate in the net produce of the property of the company. The same doctrine will apply, even where the company is *unincorporated*,—as, for instance, if it be a mining co-partnership conducted on the cost-book principle,—provided that the real estate be vested in trustees in trust to use it for the benefit of the shareholders, and to make profits out of it, as part of the stock in trade; and provided that the interest of the shareholders be confined to those profits.¹ If, however, the trustees hold the real estate in trust for themselves and the co-adventurers, present and future, in proportion to their number of shares, then there will be a direct interest in the realty; and, consequently, neither a bargain for, nor a transfer of, a share in such interest can be made without a note in writing.² Where the real property is held upon trusts, the question—under which of these two species of trusts above indicated it is held—is in general one merely of fact, to be determined in each case by the jury.³ But if the freehold which forms the basis and subject-matter of the trade of an unincorporated company, be vested in the collective body, the shares of the individual co-partners seem clearly to then fall as matter of law within the meaning of the 4th section of the Statute of Frauds.⁴

§§ 1039A—1040. It is now settled, too, that neither railway debenture stock created under the provisions of the Companies Clauses Act, 1863,⁵ nor railway debentures, are an interest in lands.⁶

¹ *Watson v. Spratley*, 1854. See *Myers v. Perigal*, 1851-2; *Walker v. Bartlett*, 1856; *Hayter v. Tucker*, 1857; *Bennett v. Blain*, 1863; *Freeman v. Gainsford*, 1865; *Entwistle v. Davis*, 1867.

² *Id.*; *Baxter v. Brown*, 1845; *Boyce v. Green*, 1826 (Ir.). See *Morris v. Glynn*, 1859.

³ *Watson v. Spratley*, 1854 (Parke and Alderson, BB.).

⁴ See, further, as to the transfer of shares in joint stock companies, ante, § 993.

⁵ 26 & 27 V. c. 118, § 22.

⁶ *Attree v. Hawe*, 1878, C. A.; *Holdsworth v. Davenport*, 1876;

Walker v. Milne, 1849. These cases overrule *Ashton v. Ld. Langdale*, 1851; and *Chandler v. Howell*, 1877. In connection with this subject it may be convenient to mention that while, as stated above, debentures are not within § 4 of the Statute of Frauds, *scrip* and *shares* in joint-stock companies, whether incorporated or unincorporated, are not “goods, wares and merchandises” within § 17 of the same statute (now replaced, as already mentioned in § 1020, by § 4, subs. 1, of “The Sale of Goods Act, 1893”). (*Humble v. Mitchell*, 1839; *Hibblewhite v. M'Morine*, 1840 (Parke, B.); *Knight*

§ 1041.¹ Returning to the consideration of what is an "interest in lands" within the statute, it may be noted that the principal difficulties in interpreting what is meant by an "interest in lands," arise in cases where trees, *growing crops*, building materials, or other things annexed to the freehold, form the subject of the contract. Lord Abinger said, as to these cases, that "no general rule is laid down in any of them, that is not contradicted by some other,"² and to this day the judges have not agreed upon any uniform test for the determination of this question.³ In some cases they have endeavoured to solve it by reference to the law of emblements; holding that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land.⁴ In other cases they have considered the test to be, whether the property in dispute could have been seized in execution at common law.⁵ In others, again, they have drawn a distinction between *fructus industriales*, and the natural products of the soil.⁶ In not a few, too, of the cases, they have rested their decisions partly on the legal character of the principal subject-matter of the contract, but principally on the consideration whether, in order to effectuate *the intention* of the parties, it were necessary to give the vendee an interest in the land.⁷

§ 1042. From this confusion of decisions it is thought, however, that two broad principles may now be extracted. The first of these broad principles may be deduced from a decision of the Common Pleas Division⁸ in 1876, and appears to be that a sale of *growing things* which are upon land is only within the

v. Barber, 1846; *Tempest v. Kilner*, 1846; *Bowlby v. Ball*, 1846; *Duncuft v. Albrecht*, 1841; *Watson v. Spratley*, 1854.) As the judgment determining this proceeds on the ground that such shares are mere choses in action (but *In re Jackson*, *Ex parte Bk. of Manchester*, 1871, *Bacon, V.-C.*, held that shares in a company were not "things in action" within the meaning of 32 & 33 V. c. 71, § 15, subs. 5 (now re-enacted by 46 & 47 V. c. 52, § 44, subs. 3)), it also inferentially determines (*Heseltine v. Siggers*, 1848) that contracts for the sale of stock or exchequer bills are not within the

Act. (*Pickering v. Appleby*, 1720-1, cited in *Colt v. Netterville*, 1725 (*Ld. Ch. King*)).

¹ Gr. Ev. § 271, in part as to first four lines.

² *Rodwell v. Phillips*, 1842.

³ See Sug. V. & P. 124—8.

⁴ *Rodwell v. Phillips*, 1842; *Jones v. Flint*, 1839.

⁵ *Dunne v. Ferguson*, 1832 (*Ir.*); *Rodwell v. Phillips*, 1842; *Jones v. Flint*, 1839.

⁶ *Jones v. Flint*, 1839; *Evans v. Roberts*, 1826; *Rodwell v. Phillips*, 1842 (*Ld. Abinger*).

⁷ *Jones v. Flint*, 1839.

⁸ *Marshall v. Green*, 1875.

statute as conferring an interest in land when it is part of the bargain that the things sold are to remain on the land till maturity, or for any other stipulated time, or when it is collateral to a transfer of the land itself; but that such a sale does not confer an interest in land, and is consequently not within the statute when growing things are sold as chattels and are to be removed from the land forthwith after the sale. Endeavouring to view all the cases as to sales of growing crops by the light of this principle, it is submitted, with some diffidence, that a fair summary of the results of these decisions is as follows:—First, a contract for the purchase of *fruits of the earth, ripe*, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them.¹ Secondly, a sale of any growing crops which would be emblements—that is to say, are growing crops which are *reared by labour and expense*, and usually repay within the year in which it is bestowed the labour by which they are produced, as, for instance, crops of corn,² hops,³ potatoes,⁴ or turnips,⁵—is not within the statute, though the purchaser is to harvest or dig them. Similarly, a contract for the sale of other growing things (for example, trees) *as chattels*, when the subject of the sale is ready to be cut and gathered at once, and the contract stipulates that they shall be removed immediately, and does not confer the possession or use of the land for any given time, either in order that it may contribute to the growth of the thing sold till its maturity, or for any other given purpose, is not a contract for an interest in land within the statute.⁶ This principle may possibly also afford a solution of the question which was once raised⁷ as to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced *within the year* in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements,

¹ Parker v. Staniland, 1809; Cutler v. Pope, 1836 (Am.).

² Jones v. Flint, 1839.

³ Parke, B., in Rodwell v. Phillips, 1842, questioning Waddington v. Bristow, 1801. See, also, Graves v. Weld, 1833.

⁴ Sainsbury v. Matthews, 1838; Evans v. Roberts, 1826; Warwick v. Bruce, 1813.

⁵ Dunne v. Ferguson, 1832 (Ir.). Emmerson v. Heelis, 1809, contra, must be considered as overruled by Evans v. Roberts, 1826, and by Jones v. Flint, 1839.

⁶ Marshall v. Green, 1875, C. A.; Smith v. Surman, 1829; explained by Ld. Abinger in Rodwell v. Phillips, 1842.

⁷ Graves v. Weld, 1833, 1 Sug. V. & P. 156 (10th edit.).

and show that such contracts do not *necessarily* fall within the statute, and only do so where they necessitate as a consequence the enjoyment of land for some given time. Thirdly, an agreement respecting the sale of growing crops, *when fit to be cut and taken*, such as growing fruit,¹ grass,² underwood,³ poles,⁴ or timber, which either necessitates the use of the land for the purpose of supporting the crops till they reach maturity, or for any other purpose, is a contract touching an interest in land, which, as such, falls within the fourth section of the Statute of Frauds, and, consequently, must be in writing.⁵ Fourthly, when a contract is made for the sale or letting of land, and the vendee or tenant at the same time contracts to purchase the growing crops on it, this last contract, even though the crops taken under it form the subject of a distinct valuation, is so incorporated with the agreement relating to the land as to be inseparable from it, and to consequently fall within the fourth section of the Act.⁶ The second broad principle appears to be that the sale of an *inanimate object* which at the time of such sale forms part of an hereditament, even though the subject of the sale be treated by the contract as a chattel, is within § 4 of the Statute of Frauds—*e. g.*, a sale, as building materials, of a house to be taken down by the purchaser.⁷

§ 1043. Where a sale of growing crops does not amount to a sale of an interest in land, it may, however, be a transaction which falls within the provisions⁸ which require a sale of goods to be in writing. This being so, it perhaps, at first sight, seems unimportant to raise any question upon the subject. But two material

¹ Rodwell *v.* Phillips, 1842; resolving a doubt suggested by Littledale, J., in Graves *v.* Weld, 1833.

² Crosby *v.* Wadsworth, 1805; Carrington *v.* Roots, 1837.

³ Scorell *v.* Boxall, 1827.

⁴ Teal *v.* Auty, 1820.

⁵ In two cases, indeed, where an agreement to sell growing timber was held not to convey any interest in the land, in one of them the timber was to be felled and taken away "as soon as possible" by the purchaser: Marshall *v.* Green, 1875; and in the other the vendor had

contracted to sell the timber at so much per foot, and the court regarded that contract in the same light as if it had related to the sale of timber already felled: Smith *v.* Surman, 1829; explained by *Ld.* Abinger in Rodwell *v.* Phillips, 1842.

⁶ *Ld.* Falmouth *v.* Thomas, 1832; Mayfield *v.* Wadsley, 1824 (Littledale, J.).

⁷ Laverly *v.* Pursell, 1888 (Chitty, J.).

⁸ Viz., "The Sale of Goods Act, 1893," § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

distinctions exist between the fourth section of the Statute of Frauds—which still governs sales of an interest in land—and the provisions now in force as to sales of goods. Contracts under the former must be stamped, while those under the latter are exempt.¹ Further, no writing is required by the provisions governing sales of goods, if the subject-matter of the contract is under the value of 10*l.*, or if there has been a part-payment, or a part-acceptance, by the purchaser.² Parol agreements touching lands will, moreover, not be enforced, unless they have been unequivocally performed in some *material* part; as, for instance, possession has been distinctly taken under them and rent paid, or the like;³ and such agreements will fall within the operation of the statute, where it would not amount to a fraud upon the acting party if the contract were not completed.⁴

§ 1044. A contract, which is substantially one for work and labour,⁵ or an agreement to procure goods for another, and to convey them to a certain place,⁶ is not subject to the provisions⁷ governing sales of goods. Neither is a contract as to fixtures governed by the above provisions or by those of sect. 4⁸ of the Statute of Frauds, for fixtures, though chattels, are not goods, wares, or merchandise.⁹ But where the principal subject-matter of a contract is the sale of goods of the price or value of 10*l.* or upwards, such contract falls within the Sale of Goods Act, 1893,⁷ though it includes other matters,—as, for instance, the agistment of cattle,—to which the Act does not apply.¹⁰ Moreover, if a person purchase several articles at one time, though at distinct prices, such transaction is regarded as one entire contract; and, if the total

¹ 54 & 55 V. c. 39 (“The Stamp Act, 1891”), Sch. I. tit. Agreement.

² Ante, § 1020.

³ *Maddison v. Alderson*, 1883, H. L., deserves attentive perusal; *Lanyon v. Martin*, 1884 (Ir.). See also *Humphreys v. Green*, 1882, C. A.; *Dale v. Hamilton*, 1816; *Lincoln v. Wright*, 1859; *Nunn v. Fabian*, 1865, H. L. (Ld. Cranworth, C.); *Howe v. Hall*, 1870 (Ir.); *Williams v. Evans*, 1875, and as to which qu.

⁴ *Maddison v. Alderson*, 1883; *Clinan v. Cooke*, 1802 (Ir.) (Ld. Redesdale). See *Haigh v. Kaye*,

1872 (Lds. JJ.); *Pulbrook v. Lawes*, 1876.

⁵ *Clay v. Yates*, 1856. But a contract to make a set of teeth to fit the employer is not a contract for work and labour, so as to dispense with the statute; *Lee v. Griffin*, 1861.

⁶ *Cobbold v. Caston*, 1824.

⁷ “The Sale of Goods Act, 1893” (56 & 57 V. c. 71), § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

⁸ Ante, § 1038.

⁹ *Horsfall v. Hey*, 1848.

¹⁰ *Harman v. Reeve*, 1856.

purchase-money amounts to 10%, it will be within the statute, though none of the articles taken separately may be of that value.¹

§ 1045. The *acceptance* and *actual receipt* mentioned by the provisions in force as to the sale of goods,² have given rise to much litigation. Without entering into any lengthened discussion, it may be observed that each of these two terms has a distinct and separate meaning;³ that a compliance with both requisites is necessary to satisfy the statute;⁴ that an acceptance and receipt of *part* of the goods will be as operative as an acceptance and receipt of the whole;⁵ that in cases relating to the purchase of *specific* goods the acceptance may precede the receipt as well as follow it or be contemporaneous with it;⁶ that an agent authorised to receive goods is not consequently authorised to accept them;⁷ that the receipt, which itself implies delivery,⁸ must be such as will preclude the vendor from retaining any lien on the goods,⁹ and that the acceptance and receipt together must be such as will preclude the purchaser from objecting to their quantity or quality.¹⁰ The broad question in such cases,—which must be submitted as one of fact to the jury,¹¹—is whether the circumstances prove a delivery by the vendor, and an acceptance and actual receipt by the vendee, intended by *both parties* to have the effect of transferring the right of possession from the one to the other.¹² Therefore the mere

¹ *Baldey v. Parker*, 1823. See, also, *Elliott v. Thomas*, 1838; *Bigg v. Whisking*, 1853.

² "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 4, superseding § 17 of the Statute of Frauds. See ante, § 1020.

³ *Cusack v. Robinson*, 1861.

⁴ *Id.*

⁵ *Morton v. Tibbett*, 1850 (*Ld. Campbell*); *Kershaw v. Ogden*, 1865.

⁶ *Cusack v. Robinson*, 1861, resolving a doubt expressed in *Saunders v. Topp*, 1849, and adopting in part a dictum of *Ld. Campbell*'s in *Morton v. Tibbett*, 1850.

⁷ *Nicholson v. Bower*, 1858; *Hansom v. Armitage*, 1822; *Norman v. Phillips*, 1845.

⁸ *Saunders v. Topp*, 1849 (*Parke, B.*).

⁹ *Baldey v. Parker*, 1823; *Maberley v. Sheppard*, 1833 (*Tindal, C.J.*);

Smith v. Surman, 1829 (*Parke, J.*); *Tempest v. Fitzgerald*, 1820 (*Holroyd, J.*); *Carter v. Toussaint*, 1822 (*Bayley, J.*); *Holmes v. Hoskins*, 1854; *Cusack v. Robinson*, 1861 (*Blackburn, J.*); *Grice v. Richardson*, 1877.

¹⁰ *Norman v. Phillips*, 1845 (*Alderson, B.*); *Smith v. Surman*, 1829 (*Parke, J.*); *Howe v. Palmer*, 1820 (*Holroyd, J.*); *Hansom v. Armitage*, 1822 (*Abbott, C.J.*); *Acebal v. Levy*, 1834 (*Tindal, C.J.*). In *Morton v. Tibbett*, 1850, the Ct. of Q. B. denied that the proposition stated in the text was law; but, though very elaborate, the judgment is by no means satisfactory. See, also, *Parker v. Wallis*, 1855; and *Currie v. Anderson*, 1859 (*Crompton, J.*).

¹¹ *Morton v. Tibbett*, 1850; *Bushel v. Wheeler*, 1844.

¹² *Phillips v. Bistolli*, 1824; recog-

marking of goods, by the vendee in the vendor's shop when they are to be paid for by ready money, is not enough, as this act, though it may constitute a valid acceptance,¹ is not such a receipt by the vendee as will deprive the vendor, even when he assents to it, of his right of lien.²

§ 1046. Where, however, a party, having agreed to purchase some wool, sent it to another warehouse for deposit, and then weighed it *and packed it* in his own sheeting, his acts were held to be a sufficient acceptance and receipt, though by the course of dealing, he was not to remove the wool to its ultimate destination before payment and no payment had been made. For the court considered that, under the circumstances, the vendor had not what could properly be called a lien on wool, but merely a special interest growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser.³ Again, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable; this direction was held equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession;⁴ where a timber merchant, having bought some growing trees by verbal contract, cut down six of them and sold the lops and tops, it was held to be too late for the vendor of the trees to countermand the sale;⁵ and where a vendee had sold to a third person part of a stack of hay purchased by parol, and this sub-purchaser had actually taken away his part, a jury were held

nised in *Maberley v. Sheppard*, 1833. See *Curtis v. Pugh*, 1847; *Saunders v. Topp*, 1849; and *Tomkinson v. Staight*, 1856.

¹ *Cusack v. Robinson*, 1861.

² *Baldey v. Parker*, 1823; *Bill v. Bament*, 1841; *Proctor v. Jones*, 1826; *Kealy v. Tenant*, 1861 (Ir.); which seem virtually to overrule *Hodgson v. Le Bret*, 1808; and *Anderson v. Scot*, 1806. See *Saunders v. Topp*, 1849; and *Acraman v. Morrice*, 1849.

³ *Dodsley v. Varley*, 1840; *Langton v. Higgins*, 1859; *Aldridge v. John-*

son, 1857; *Kershaw v. Ogden*, 1865. See *Simmonds v. Humble*, 1862. As to the effect of handing over a sample of the goods, see *Gardner v. Grout*, 1857.

⁴ *Elmore v. Stone*, 1809; explained and recognised by *Bayley, J.*, in *Smith v. Surman*, 1829. See *Castle v. Swarder*, 1861; *Carter v. Toussaint*, 1822; *Beaumont v. Brengeri*, 1847; *Holmes v. Hoskins*, 1854; *Marvin v. Wallace*, 1856. See, also, *Taylor v. Wakefield*, 1856.

⁵ *Marshall v. Green*, 1875.

C. III.] MEANING OF ACCEPTANCE AND ACTUAL RECEIPT.

justified in finding that there had been an acceptance and actual receipt of the whole stack.¹

§ 1047. A person, intrusted with goods to sell, may himself become the purchaser by parol, and do subsequent acts amounting to an acceptance and receipt; as, for instance, if he sells them to a stranger on his own account.² The evidence to sustain such a case must, however, be extremely clear.³

§ 1048. Where goods are ponderous and incapable of being handed over from one to another, a constructive delivery,—such, for example, as the giving up the key of the warehouse in which they are deposited, or the delivery of other indicia of property,—will be sufficient.⁴ But, in all these cases, the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal.⁵ Therefore, where goods are at the time of sale in the possession of a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order, will not amount to an actual receipt of the goods, so as to bind the bargain.⁶ To have this effect, the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or in other words, agree to hold the property henceforth as his agent.⁷

§ 1049. One of the chief difficulties upon questions as to the actual receipt and acceptance of goods which have been the subjects of sale, arises where goods, verbally purchased, are delivered to a carrier or wharfinger named by the vendee. It seems to have been once considered, that such delivery was sufficient to satisfy the statute.⁸ It has since, however, been held, that though the delivery to the carrier may be a delivery to and “receipt” by the purchaser, the acceptance of the carrier is not an “acceptance” by such purchaser.⁹ Therefore, where timber, verbally ordered, was

¹ *Chaplin v. Rogers*, 1800; recognised by Bayley, J., in *Smith v. Surman*, 1829, as reported 9 B. & C. 570. See *Stoveld v. Hughes*, 1811; and *Searle v. Keeves*, 1797.

² *Edan v. Dudfield*, 1841; *Lilly-white v. Devereux*, 1846.

³ *Id.*

⁴ *Chaplin v. Rogers*, 1800 (Ld. Kenyon).

⁵ *Nicholle v. Plume*, 1824 (Best, C.J.); *Edan v. Dudfield*, 1841.

⁶ *M'Ewan v. Smith*, 1849, H. L.

⁷ *Farina v. Home*, 1846 (Parke, B.); *Bentall v. Burn*, 1824.

⁸ *Hart v. Sattley*, 1814 (Chambre, J.). See *Dawes v. Peck*, 1799; and *Dutton v. Solomonson*, 1803.

⁹ *Johnson v. Dodgson*, 1837 (Parke, B.). See *Acebal v. Levy*, 1834;

forwarded in this manner to the purchaser, but he refused to take it in, a jury were held not to be warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to take the goods till after the expiration of more than *one* month.¹ Under somewhat similar circumstances, however, where no rejection of the goods had taken place for *seven* months, an opposite decision was arrived at, Coleridge, J., resting his judgment on the ground that the inspection of the goods was to be made within a reasonable time.² Whether this particular distinction can be supported is perhaps a question. But it is at least clear that, as a general rule, if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to object to them, and his conduct will amount to an acceptance;³ and further, the same principle will also hold, if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality.⁴ It also is clear, that, if the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property continuing in the vendor,—as, for instance, if he changes their original destination, or resells them to a third party at a profit,—the jury will be justified in finding that he has accepted the goods and actually received them, though they have been merely delivered to his carriers, and he himself has never seen them.⁵

§ 1050. We may now leave the consideration of the Statute of Frauds. The next statute by which matters are required to be evidenced by writing, in the cases specified, is "*The Wills Act, 1837.*"⁶

Coats v. Chaplin, 1842; Nicholson v. Bower, 1858.

¹ Norman v. Phillips, 1845; Meredith v. Meigh, 1853; Hunt v. Hecht, 1853; Hart v. Bush, 1858; Coombs v. Bristol & Ex. Rail. Co., 1858; Smith v. Hudson, 1865.

² Bushel v. Wheeler, 1844; explained by Alderson, B., in Norman v. Phillips, 1845, as reported 14 M. & W. 282. See, also, Currie v. Anderson.

1860.

³ Coleman v. Gibson, 1832 (Ld. Tenterden); Norman v. Phillips, 1845 (Alderson, B.); Bowes v. Pontifex, 1863 (Bramwell, B.).

⁴ Norman v. Phillips, 1845 (Alderson, B.).

⁵ Morton v. Tibbett, 1850, explained by Martin, B., in Hunt v. Hecht, 1853.

⁶ 7 W. 4 & 1 V. c. 26.

This came into operation 1st January, 1838,¹ and effected extensive amendments in the law respecting these instruments. It will here be expedient to notice such of the alterations as relate to the *execution of wills*. By the Act, every will, codicil, or other testamentary disposition,—including appointments made by will, or by writing in the nature of a will, in exercise of any power,² whether such power were created before or after the Act came into operation,³ but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual military service, or by seamen and mariners at sea,⁴—if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st January, 1838,⁵ must be in writing, “and be signed at the foot or end thereof by the testator, or by some other person in his presence,⁶ and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”⁷ Appointments by will, if executed in this manner, are valid, although the power, under which they were made, expressly requires some additional solemnity in the execution;⁸ and all wills, executed as above stated, are to be deemed good without other publication.⁹

§ 1051. With the view, however, of preventing frauds, to which seafaring men are supposed to be more than ordinarily subject, the Act requires the wills of petty officers and seamen in the Royal

¹ The Act is due to the exertions of Ld. Langdale.

² §§ 1 and 10.

³ Hubbard v. Lees, 1866.

⁴ § 11. As to nuncupative wills, see post, § 1062, and 1 Will. on Ex. 62—89.

⁵ § 34.

⁶ Kevil v. Lynch, 1873 (Ir.).

⁷ § 9. A will written in *pencil* has been decided to be a good will; Dickenson v. Dickenson, 1814; Re Dyer, 1828; but not (as decided in America) one written on a *slate*. Reed v. Woodward (Am.). But it may be in the form of a letter if intended to be testamentary and properly executed. Cowley v. Knapp.

1886 (Am.). § 7 of the Indian Will Act, No. 25, of 1838, contains the same language, with the single omission of the words “shall attest and” after “witnesses,” and before “shall subscribe.” This alteration makes no difference in the construction. Ld. Brougham in Casement v. Fulton, 1845, P. C.

⁸ § 10. See, however, and compare Buckell v. Bleakhorn, 1846; Collard v. Sampson, 1853; West v. Ray, 1854; Taylor v. Meads, 1865; and Smith v. Adkins, 1872.

⁹ § 13. As to the meaning of the phrase “publication of a will,” see Vincent v. Bp. of Sodor and Man, 1851, and cases there cited.

Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and moneys payable in respect of services in her Majesty's Navy,¹ to be drawn, executed, and attested in a more formal manner than instruments made by other persons, who are presumed to have greater experience.²

§ 1052. In contrasting the provisions in "The Wills Act, 1837," with those formerly contained in the Statute of Frauds,³ it will be observed, first, that the present Wills Act is not confined (as the Act of Charles II. was) to devises of freehold realty, but it applies equally to *all* wills, whether of freehold, copyhold, or personalty; secondly, that it makes two attesting witnesses sufficient and necessary in all cases, whereas the former statute required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge⁴ his signature in the *actual contemporaneous presence* of the witnesses, though this was not necessary under the former Act; and fourthly, that the will must be signed "at the foot or end thereof," whereas, formerly, the signature was sufficient if appearing in any part of the instrument.⁵ It also has been further laid down that under the Wills Act both the attesting witnesses must *subscribe* the will *at the same time and in each other's presence*; and that a will signed in the presence of a single witness who then attested it, his signature to which the testator acknowledged subsequently, in the presence of this witness and another, who thereupon also witnessed it, was not properly attested notwithstanding that on the second occasion the first witness had acknowledged, although he had not re-written his own signature.⁶ Again, where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen,⁷ and also where

¹ § 12.

² 11 G. 4 & 1 W. 4, c. 20, §§ 48—50; 28 & 29 V. c. 72, and c. 112, § 1.

³ 29 C. 2, c. 3, § 5; 7 W. 3, c. 12, § 3, Ir.

⁴ See *Morritt v. Douglass*, 1872.

⁵ Post, § 1057.

⁶ *Casement v. Fulton*, 1845, P. C.; *Moore v. King*, 1842; *In re Simmonds*, 1842; *In re Allen*, 1839; *Slack v.*

Busteed, 1856 (Ir.). See, however, *Faulds v. Jackson*, 1845; and *In re Webb*, 1855, in which last case, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in *Chodwick v. Palmer*, 1851, held that the witnesses need not subscribe the will in the presence of each other.

⁷ *Playne v. Scriven*, 1849 (Sir H. Fust). See post, § 1113.

another witness, under similar circumstances, corrected an error in his name as previously written, and added the date,¹ the court in both these cases held that there had not been a sufficient compliance with the statute.²

§ 1053. The word "presence," mentioned in the statute, means not only a bodily, but a mental presence. Therefore, the Act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or, it would seem, even blind³ or inattentive, at the time when the will is signed or acknowledged.⁴ So strictly indeed has this rule been interpreted, that probate was rejected where a testator had only acknowledged a paper to be his will in the presence of two witnesses, neither of whom had seen him sign it, nor seen his signature at the time of their subscription, though both witnesses said that they had seen the testator writing on the paper, and the will, when produced, actually bore his signature.⁵

§ 1054. A somewhat less stringent construction has, however, been put on that part of the Act which requires the witnesses to subscribe in the presence of the testator. For although if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have been able to see them write,⁶ yet a will was admitted to probate where a testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence.⁷ This distinction is adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act,

¹ *Hindmarsh v. Charlton*, 1861, H. L.

² *In re Eynon*, 1873.

³ See *In re Mullen*, 1871, where a blind testator was held capable of acknowledging his signature to his will.

⁴ *Hudson v. Parker*, 1844 (Dr. Lushington).

⁵ *Hudson v. Parker*, 1844; *Blake v. Blake*, 1882, C. A. But see *Smith v. Smith*, 1868.

⁶ *Norton v. Bazett*, 1856. *Ante*, § 163.

⁷ *Newton v. Clarke*, 1839. But see *Tribe v. Tribe*, 1849; *In re Killick*, 1865. *Ante*, § 163.

they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign.¹ An attestation while the alleged testator is insensible is, however, of course, bad,² and his subsequent declarations that he did not *knowingly* see them sign a will, are admissible.³

§ 1055. In enacting that the testator must "make or acknowledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the signature was made "by some other person" than the testator, but meant it to apply equally to those cases where the signature had been previously made by himself.⁴ In making the acknowledgment,⁵ it is not necessary that the testator should actually point out to the witness his name, and say, "This is my name, or my handwriting;" but if he states that the whole instrument was written by himself,⁶ or if he produces a paper as his will, and requests the witnesses to put their names *underneath his*,⁷ or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it,⁸ or even, it seems, if he shows a paper in his handwriting to the witnesses and desires, or allows a bystander to desire,⁹ them to sign it, though he does not state and the witnesses do not know that such paper is his will,¹⁰ this will be a sufficient acknowledgment of his signature, if it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen at the same time by the necessary witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses before they subscribed the will, either saw the testator sign it or saw his signature attached to it, he must pronounce

¹ *Hudson v. Parker*, 1844 (Dr. Lushington).

² *Right v. Price*, 1779.

³ *Canada's Appeal*, 1880 (Am.).

⁴ In *re Cornelius Regan*, 1838, recognised in *Ilott v. Genge*, 1842.

⁵ The acknowledgment *may* be made by a blind testator, In *re Mullen*, 1871 (Ir.).

⁶ *Blake v. Knight*, 1843.

⁷ *Gaze v. Gaze*, 1843.

⁸ In *re Davies*, 1849.

⁹ See *Faulds v. Jackson*, 1845 (Ld.

Brougham); *Inglesant v. Inglesant*, 1874.

¹⁰ *Keigwin v. Keigwin*, 1843; In *re Ashmore*, 1843 (Sir H. Fust); In *re Bosanquet*, 1852; In *re Dinmore*, 1853; In *re Jones*, 1855; *White v. Trustees of British Museum*, 1829; *Wright v. Wright*, 1831; *Johnson v. Johnson*, 1832. It may, however, be pointed out that in such cases there is nothing to direct the attention of the witnesses to the alleged testator's mental state.

against its validity ; for the statute requires, not that the *will*, but that the *signature*, should be attested.¹ It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator affixes his signature in their presence immediately afterwards, and though they subsequently seal the document.²

§ 1056. But it is not absolutely essential to the validity of a will that positive affirmative evidence should be given by the subscribing witnesses that the testator either signed it, or acknowledged his signature to it, in their presence, since the court may *presume due execution* under the circumstances.³ Thus, where, three years after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was presumed to be conversant with business, to see him sign his will ; that he then produced a paper, telling them that it was his will and in his handwriting ; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument ; that he did not sign in their presence ; that when they attested the paper no seal was upon it, but they could not positively swear that there was no signature ; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed.⁴ So, also, if a will contain an attestation clause, and purport to be duly signed by the testator and two witnesses, the court will *prima facie* presume, when it is proved that the witnesses are dead or cannot be found, or in the event of their not remembering the facts attendant on the execution, that the statute has been complied with, and that *omnia rite esse acta*.⁵ If, however, *one* witness assert that

¹ *Hudson v. Parker*, 1844 ; *Blake v. Blake*, 1882, C. A. ; *Ilott v. Genge*, 1842 ; *Countess de Zichy Ferraris v. M. of Hertford*, 1843 ; *In re Summers*, 1850 ; *In re Pearsons*, 1864 ; *Fischer v. Popham*, 1875.

² *In re Byrd*, 1842 ; *In re Olding*, 1841 ; *Cooper v. Bockett*, 1843 ; *Burke v. Moore*, 1875 (Ir.).

³ See *Doe v. Davies*, 1846 (Ld. Denman) ; ante, § 149.

⁴ *Blake v. Knight*, 1843. See, also, *Beckett v. Howe*, 1869 ; *Olver v. Johns*, 1870 ; *Kelly v. Keatinge*, 1871 (Ir.) ; *In re Janaway*, 1875.

⁵ *Baxendale v. De Valmer*, 1887 ; *Wright v. Sanderson*, 1884, C. A. ; *Burgoyne v. Showler*, 1844 (Dr. Lushington) ; *Hitch v. Wells*, 1846 ; *In re Leach*, 1848 (Sir H. Fust) ; *Leech v. Bates*, 1849 ; *In re Rees*, 1865 ; *Brenchley v. Still*, 1850 ; *Thomson v. Hall*, 1852 ; *In re Hclgate*, 1859 ; *Lloyd v. Roberts*, 1858, P. C. ; *Foot v. Stanton*, 1856 ; *Reeves v. Lindsay*, 1869 (Ir.) ; *Vinnicombe v. Butler*, 1865 ; *Smith v. Smith*, 1866 ; *O'Meagher v. O'Meagher*, 1883 (Ir.). See *Croft v. Croft*, 1865 ; and *Wright v. Rogers*, 1869.

he does remember, and positively negatives signing or acknowledgment of signature by the alleged testator in his presence, the document set up cannot be admitted to probate.¹ The presumption *omnia præsumentur ritè esse acta* may also be recognised even in cases where no attestation clause is attached to the will,² and where circumstances exist, which a non legal mind might well deem sufficiently suspicious to justify a very different inference.³

§ 1057. It was at one time thought, and has always been held in Ireland,⁴ that the clause requiring the testator to sign “at the foot or end” of the testament would be satisfied, though the will itself were wholly written on the first side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side.⁵ Ultimately, however, a much stricter construction was put upon the Act, and very many wills were refused probate, because the testator had inadvertently permitted a trifling blank space to be interposed between the final word of the instrument and his signature.⁶ But in 1852, Lord Chancellor St. Leonards carried an Act,⁷ which has remedied the principal evils that arose from the former state of the law.

§ 1058. The first section of this Act enacts that “Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite⁸ to the end of the will, that it shall be apparent on the face of the will that the testator intended to give

¹ Greenleaf on Ev. 15th edit. (1892), 369, citing *Noding v. Alleston*, Shaw v. Neville, *Bennett v. Sharpe*.

² *In re Thomas*, 1859 (Sir C. Cresswell); *Gwillim v. Gwillim*, 1860; *Vinnicombe v. Butler*, 1865.

³ *Trott v. Skidmore*, 1860; *In re Huckvale*, 1867; *In re Pearn*, 1875. But see *Pearson v. Pearson*, 1872.

⁴ *Derinzy v. Turner*, 1851 (Ir.).

⁵ *In re Gore*, 1843; *In re Carver*, 1842.

⁶ See *Smee v. Bryer*, 1848, P.C.; *In re Howell*, 1848; *In re Corder*, 1848; *In re Attridge*, 1848. Where testator

signed between the testimonium clause and words descriptive merely of the witnesses, probate was granted; *In re Cotton*, 1848. See, also, *In re Beadle*, 1849; *In re Standley*, 1849; *In re Brown*, 1849; *In re Banly*, 1849; *In re Hellings*, 1849; *In re Hearn*, 1849; *In re Odell*, 1849; *In re Batten*, 1849; *Holbech v. Holbech*, 1849; *In re Minty*, 1850; *In re Hill*, 1849; *In re White*, 1850.

⁷ 15 & 16 V. c. 24.

⁸ *In re Williams*, 1865; *In re Coombs*, 1866.

effect by such his signature to the writing signed as his will,¹ and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation,² or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after,³ or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature,⁴ or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature;⁵ and the enumeration of the above circumstances shall not restrict the generality of the above enactment;⁶ but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath⁷ or which follows it,⁸ nor shall it give effect to any disposition or direction inserted after the signature shall be made.”⁹

§ 1059. Although the testator is, for obvious reasons, required by the Wills Act to sign the will “at the foot thereof,” the Act points out no place for the signature of the witnesses, and a testament is duly executed, even where the attestation clause and the signatures of the witnesses are indorsed upon it.¹⁰ The Court, how-

¹ See *Cook v. Lambert*, 1863, where a signature written on a piece of paper, previously wafered to the foot of the will, was held sufficient. See, also, *In re Gausden*, 1862; *In re Hammond*, 1863; *In re West*, 1862; *In re Wright*, 1865. But see *In re M'Key*, 1876 (Ir.).

² *In re Mann*, 1859; *In re Casmore*, 1869.

³ *In re Puddephatt*, 1870; *In re Jones*, 1877.

⁴ *In re Archer*, 1871.

⁵ *Hunt v. Hunt*, 1866; *In re Rice*, 1870 (Ir.).

⁶ See *In re Wotton*, 1874.

⁷ See *In re Kimpton*, 1864 (Wilde, J.O.); *In re Woodley*, 1864; *In re Jones*, 1864; *In re Powell*, 1864; *In re Ainsworth*, 1870.

⁸ See *Sweetland v. Sweetland*, 1865; *In re Birt*, 1871; *In re Dilkes*, 1874.

⁹ These provisions apply to wills already made, see § 2.

¹⁰ *In re Chamney*, 1849. See *In re Taylor*, 1851.

ever, in all such cases must be satisfied that the signatures, wherever placed, were really intended to attest the operative signature of the testator.¹

§ 1060. Under the Wills Act of 1838, as under the Statute of Frauds, a testator may have his hand guided by another person,² or he may sign by his mark or initials only,³ though his name does not appear, or though a wrong name does by mistake appear,⁴ in the body of the will;⁵ and the attesting witnesses, whether they can write or not, may also sign as marksmen;⁶ and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other.⁷ It is even sufficient for witnesses to subscribe the will by their initials.⁸ In consequence of the provisions in the Wills Act that "no form of attestation shall be necessary," a mere subscription of two names, without any memorandum to show that the parties have subscribed as witnesses, will satisfy the statute.⁹ Even writing their names in its margin opposite to alterations, &c., in a will, where the Court is satisfied that it was done with intent to attest it, is a sufficient attestation.¹⁰ Under either Act, any person, as, for instance, one of the two attesting witnesses may write,¹¹ or even stamp,¹² the testator's signature by his direction. Even where the drawer of a will, being requested by the testator to sign for him, put *his own* signature to the instrument, this was held to be suffi-

¹ Phipps *v.* Hale, 1874.

² Wilson *v.* Beddard, 1846.

³ Baker *v.* Denning, 1838; In re Blewitt, 1880. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name; and no proof is required that the will was read over to him; Clarke *v.* Clarke, 1868 (Ir.). Sealing a will is not a sufficient signing; Smith *v.* Evans, 1851; Grayson *v.* Atkinson, 1852.

⁴ In re Douce, 1862; In re Clarke, 1858.

⁵ In re Bryce, 1839.

⁶ In re Amiss, 1849; Clarke *v.* Clarke, 1879 (Ir.). But an attesting witness cannot subscribe a will in another person's name. Pryor *v.* Pryor, 1860.

⁷ Harrison *v.* Elvin, 1842; In re Lewis, 1862; In re Frith, 1858;

Lewis *v.* Lewis, 1861; Roberts *v.* Phillips, 1855.

⁸ In re Christian, 1849 (Sir H. Fust); In re Blewitt, 1880. See In re Trevanion, 1850; Hindmarsh *v.* Charlton, 1849, H. L., cited ante, § 1052. See, too, In re Sperling, 1864, where a witness, instead of signing his name, wrote "servant to M. S.," and this was held sufficient. But where an infirm witness, intending to sign his name, could only write "Saml.," and omitted his surname, the signature was held to be insufficient. In re Maddock, 1874.

⁹ Bryan *v.* White, 1850. See Griffiths *v.* Griffiths, 1871.

¹⁰ In the goods of Streathley, 1891.

¹¹ Smith *v.* Harris, 1845; In re Bailey, 1838.

¹² Jenkins *v.* Gaisford, 1863. See Bennett *v.* Brumfitt, 1867; and ante, § 1029.

cient, as the Act does not say that the signature must bear the testator's name.¹ The witnesses, however, must attest the will, either by their signature or their marks, and when a stranger, at the request of the testator, signed for one of the witnesses who was unable to write, probate was refused.²

§ 1061. A paper imperfect in itself may, by *clear reference* to it as an *existing* document,³ be identified with a will which has been validly executed in such a way as to form part of such will, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured.⁴ Unattested wills and codicils have thus constantly been set up by subsequent attested codicils which have confirmed them.⁵ Where, however, a testator at the foot of a valid will of 1833 made two codicils prior to the 1st of January, 1838, and five more after that date, but the whole seven of these codicils were altogether unattested, and the testator then in 1847 duly executed an eighth codicil on a separate paper, which he described as "a codicil to his will," it was held that the five unattested codicils were not rendered valid by the eighth codicil, as they, legally and technically speaking, formed no part of the testator's will.⁶

§ 1062. By § 11 of "The Wills Act, 1837," all wills of personal estate made by "any soldier being in actual military service, or any mariner or seaman being at sea," are exempted from the operation of the Act. The word "soldier" here includes all officers

¹ In re Clark, 1839. See, also, In re Blair, 1848.

² In re Cope, 1850; In re Duggins, 1870.

³ Singleton v. Tomlinson, 1878, H. L.; In re Kehoe, 1884 (Ir.); Dickinson v. Stidolph, 1861; Van Straubenzee v. Monck, 1863; In re Greves, 1859; Allen v. Maddock, 1858; In re Almosnino, 1860; In re Brewis, 1864; In re Luke, 1865; In re Lady Truro, 1866; In re Sunderland, 1866; In re Watkins, 1865; In re Dallow, 1866. See post, § 1195, ad fin.

⁴ Countess de Zichy Ferraris v. M. of Hertford, 1843 (Sir H. Fust); In re Lady Durham, 1842; In re Dickens, 1842; In re Willesford, 1842; Habbergham v. Vincent, 1793;

In re Edwards, 1848; In re Ash, 1856; In re Lady Pembroke, 1856; In re Stewart, 1863. See ante, § 1026.

⁵ Aaron v. Aaron, 1849; Utterton v. Robins, 1834; Gordon v. Ld. Reay, 1832; Doe v. Evans, 1832; Allen v. Maddock, 1858; In goods of Heathcote, 1881. See In re Allnutt, 1864; Anderson v. Anderson, 1872; and especially Burton v. Newbery, 1875 (Jessel, M.R.); and Green v. Tribe, 1878 (Fry, J.).

⁶ Haynes v. Hill, 1849. See, also, Johnson v. Ball, 1851; In re Drummond, 1880; In re Tovey, 1878; Stockil v. Punshon, 1880; In re Mathias, 1863; In re Wyatt, 1862; In re Lady Truro, 1866; In re Hall, 1871.

and soldiers who have been in the employ of the East India Company, as well as those in her Majesty's service.¹ The privilege is confined to such soldiers as are actually *on an expedition*;² consequently, officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception.³ The Act applies to seamen in the merchant, as well as in the Queen's, service,⁴ and the purser of a man-of-war⁵ and a surgeon in the navy⁶ are both included in the term "seamen." The exception extends to an invalided seaman, who is returning home from foreign service in a passenger ship,⁷ and also to a naval captain on board a Queen's ship in harbour or a river, provided he be actually engaged on active service.⁸ But it does not extend to an admiral in command of a fleet in the colonies, who lives with his family on shore at his official residence.⁹ Material alterations contained in soldiers' wills may, in the absence of evidence, be presumed to have been made while the respective testators were employed in actual military service.¹⁰

§ 1062A. The Wills Act was originally held to apply to the testamentary papers of all domiciled Englishmen excepting those specified in the last section, even when such papers were executed in foreign countries.¹¹ This, however, being found in practice productive of injustice, the Legislature in 1861 passed "The Wills Act, 1861,"¹² which in substance enacts that every will made out of the United Kingdom by a British subject, whatever his domicile may be, shall, as regards personal estate, be entitled to probate, if made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled.¹³

¹ *Shearman v. Pyke*, 1724, cited 3 Curt. 539—542.

² See *Herbert v. Herbert*, 1855.

³ *Drummond v. Parish*, 1843; *In re Hill*, 1845; *White v. Repton*, 1844; *Bowles v. Jackson*, 1854.

⁴ *In re Milligan*, 1849.

⁵ *In re Hayes*, 1839 (Am.).

⁶ *In re Saunders*, 1865.

⁷ *Id.*

⁸ *In re Admiral Austen*, 1853; *In re M'Murdo*, 1867. See, also, *In*

goods of Rae, 1891 (Ir.).

⁹ *Ld. Euston v. Ld. H. Seymour*, 1802, cited 2 Curt. 339, and recognised in *Drummond v. Parish*, 1843.

¹⁰ *In re Tweedale*, 1874.

¹¹ *Crocker v. M. of Hertford*, 1844, P. C.

¹² 24 & 25 V. c. 114.

¹³ The Act only applies to such persons: *In goods of Keller*, 1891. It will not apply to a testamentary exercise of a power: *Re Kirwan's*

§ 1063. In addition to those enactments in it which have been already mentioned, "The Wills Act, 1837," further provides, "that every will made by a man or woman shall be *revoked* by his or her *marriage*, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions;"¹ and "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances;"² and "that no will, or codicil,³ or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required,⁴ or by some writing declaring an intention to revoke the same,⁵ and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."⁶ Where a testator had destroyed his will on the supposition that he had substituted another for it, but the latter instrument turned out to be invalid as not being duly executed, a copy of the first will was held to be entitled to probate.⁷ With respect to the *re-execution* of a will, in which alterations have been made, it cannot be too well understood that a tracing by a testator with a dry pen over his former signature in the presence of witnesses cannot be regarded as equivalent to a re-signature.⁸

§ 1064. To revoke a former will by a later one, no revocation

Trusts, 1883. Nor to a person who, though his domicile of origin was English, was at his death domiciled in Germany, leaving a will in English form: *Bloxam v. Favre*, 1884, C. A.

¹ 7 W. 4 & 1 V. c. 26, § 18. See *In re Sir C. Fitzroy*, 1858; *Re M'Vicar*, 1869.

² § 19. Or by any change of domicile, 24 & 25 V. c. 114 ("The Wills Act, 1861"), § 3.

³ *In re Turner*, 1872. See ante, § 165.

⁴ Ante, § 1050.

⁵ *De Pontès v. Kendall*, 1862 (*Romilly, M.R.*). See *In re Hicks*,

1869; *In re Fraser*, 1869; *In re Durance*, 1872. A verbal authority, given by a Hindu testator to another person to destroy his will, will revoke the instrument, even though it be not destroyed: *Maharajah Pertab Narain Singh v. Maharanee Subhao Koor*, 1877, P. C.

⁶ § 20. See *Mills v. Milward*, 1890.

⁷ *Scott v. Scott*, 1859; *Clarkson v. Clarkson*, 1862; *Giles v. Warren*, 1872; *Dancer v. Crabb*, 1873; *Powell v. Powell*, 1866; overruling *Dickinson v. Swatman*, 1861. See *Eckersley v. Platt*, 1866; *Re Weston*, 1869; and post, § 1070.

⁸ *In re Cunningham*, 1860.

clause is absolutely necessary; but any paper duly executed, by which the testator disposes of his *whole* property, is,—except under very special circumstances,¹—a revocation in toto of all previous wills. This doctrine is applicable, even where the last testamentary paper contains no appointment of executors.² Indeed, in one case where a testator by his “*last will*,” in which executors were appointed, disposed of *part* of his personalty, a former will was held to be revoked, though it contained provisions not wholly inconsistent with the later instrument.³ The onus of establishing revocation lies, however, on the party who impeaches the first will; and no inference in his favour can be drawn from the mere fact that the later instrument contains equivocal expressions, or that the legacies bequeathed by it are *partially* inconsistent with prior testamentary dispositions.⁴ Still, if two documents taken together would dispose of property far larger than that possessed by the testator, that fact in itself raises a fair inference that the first was intended to be revoked by the second;⁵ and, indeed, in every inquiry of this nature, if any real ambiguity can be shown to exist respecting the testator’s intentions, recourse may be had to parol evidence to clear up the doubt.⁶

§ 1065. Where a second will, which was not produced, contained a different disposition of real estate from a former one, “but in what particulars is unknown,” the House of Lords, on writ of error, decided that the first will was not revoked, so as to let in the title of the heir-at-law;⁷ and in another case in which the contents

¹ See *O’Leary v. Douglass*, 1878 (Ir.).

² *Henfrey v. Henfrey*, 1842, P. C.

³ *Plenty v. West*, 1845. See, also, S. C. in Ch. 1853. Little, if any, weight, however, can now be attached to this decision. For, in the first place, it appears clear that the phrase “last will” will simply be regarded as one of form. (*Stoddart v. Grant*, 1851-2, H. L. (Ld. Truro); *Freeman v. Freeman*, 1855.) And in the next place, according to a maxim which has received the solemn sanction of the Court of last resort, a former will cannot be revoked by one of later date, unless the later instrument contains a clause of express revocation, or unless the two wills are incapable of standing together. (*Stoddart v. Grant*, 1851-2, H. L. See

Williams v. Williams, 1877, C. A.; *In re Graham*, 1863; *Dempsey v. Lawson*, 1877; *Shiel v. O’Brien*, 1872 (Ir.); *Leslie v. Leslie*, 1872 (Ir.); *Lemage v. Goodban*, 1865; *In re Fenwick*, 1867; *Geaves v. Price*, 1863; *Birks v. Birks*, 1865; *In re Petchell*, 1874; *Re Macfarlane*, 1884 (Ir.).)

⁴ *Stoddart v. Grant*, 1851-2, H. L. See, also, *Doe d. Hearle v. Hicks*, 1831-2, H. L.; *Wallace v. Seymour*, 1871 (Ir.); *Doe v. Ward*, 1852; *Williams v. Evans*, 1853; *Freeman v. Freeman*, 1854; *Barclay v. Maskelyne*, 1859; *Robertson v. Powell*, 1864; *Pilsworth v. Mosse*, 1862 (Ir.).

⁵ *Jenner v. Finch*, 1879 (Sir J. Hannen).

⁶ *Id.*

⁷ *Goodright v. Harwood*, 1774-5,

of the second will were utterly unknown, save that it commenced with the words "This is the last will and testament," the Judicial Committee of the Privy Council held that the prior will remained unrevoked.¹ A general clause in a will revoking all former wills does not of itself necessarily operate to revoke a will made in execution of a power;² though it will be held to have that effect, unless such a result can be shown to be utterly unreasonable.³ It seems that the re-execution of a will, containing a clause of revocation, will not in general be deemed to have revoked any of its codicils; for, unless the contrary appears to have been the intention of the testator, the court will hold, that all the codicils have been republished by the re-execution of the principal instrument.⁴

§ 1066. With respect to the revocation of a will by its destruction, it should be observed that a testator cannot revoke his will by authorising any person to destroy it *out of his presence*; and it follows as a corollary from this proposition, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death.⁵

§ 1067. It is difficult to fix *à priori* what extent of *burning* or *tearing* will amount to the revocation of a will. It is clear that the revocation will not be complete, unless the act of spoliation be deliberately done upon the instrument, in the belief that it is a valid will,⁶ and *animo revocandi*.⁷ This is expressly rendered necessary by the Wills Act,⁸ and was impliedly required by the statute of Charles.⁹ It is further clear that the burthen of showing that a once valid will has been revoked by mutilation, will lie upon the party who sets up the revocation of the instrument.¹⁰ There may, moreover, be a partial revocation.¹¹ Moreover, it seems plain, on general principle, that the declarations of the testator, accompanying the act of spoliation,—unlike those which he may subsequently make,¹²—will be admissible in evidence as

H. L. See *Thomas v. Evans*, 1802; *Brown v. Brown*, 1858; *Dickinson v. Stidolph*, 1861; *In re Brown*, 1858.

¹ *Cutto v. Gilbert*, 1854, P. C.

² *In re Merritt*, 1858.

³ *Sotheran v. Denning*, 1881, C. A.

⁴ *Wade v. Nazer*, 1848. See *In re De la Saussaye*, 1873.

⁵ *Stockwell v. Ritherdon*, 1848 (Sir H. Fust).

⁶ *Giles v. Warren*, 1872.

⁷ See *In re Cockayne*, 1856.

⁸ Ante, § 1063.

⁹ *Bibb v. Thomas*, 1776-7.

¹⁰ *Harris v. Berrall*, 1858; *Benson v. Benson*, 1870; *In goods of Taylor*, 1890.

¹¹ *In goods of Leach*, 1890.

¹² *Staines v. Stewart*, 1862. But see *Cheese v. Lovejoy*, 1877, C. A.

explanatory of his intention.¹ Still the question remains, Must there be a total or substantial burning or tearing of the writing itself, or will the revocation be complete, if the testator, intending to revoke, tears or burns a portion of the paper on which the will is written, but does not destroy or deface any part of the writing?² Where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards *himself* fitted the several pieces together, and put them by, saying he was glad it was no worse; the court refused to disturb a verdict by which the jury had found *that the act of cancellation was incomplete*.³

§ 1068. Such acts as the *cutting* out his signature by a testator, or tearing off the *seal* from a will, needlessly executed as a sealed instrument, have been deemed sufficient, both in England and in America, to destroy the will in its entirety, and to effect its revocation,⁴ if not by force of the word "tearing," at least as being a manner of "otherwise destroying the same."⁵ Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and of the attesting witnesses remained uninjured, the court, guided by the peculiar nature of the mutilations, and, in the absence of any extrinsic evidence, held the instrument not to be revoked.⁶

§ 1069. The provisions of the Statute of Frauds which related to wills, made "*cancelling*" one of the modes of revoking a will.⁷ But it is enacted by "The Wills Act, 1837,"⁸ "that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be

¹ *Dan v. Brown*, 1825 (Am.); *Clarke v. Scripps*, 1852.

² See *Doe v. Harris*, 1837.

³ *Doe v. Perkes*, 1820. It will be observed that this case proceeded on the ground that the cancellation was incomplete. But in an older case of *Bibb v. Thomas*, 1776-7, where a testator, having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumbled it up and threw it into the fire, but a bystander saved it without his knowledge, before, as it seems, it was at all burnt, the revocation was held complete. This

last-mentioned case has, however, been doubted. See *Doe v. Harris*, 1837 (Ld. Denman).

⁴ *Price v. Powell*, 1858; *Avery v. Pixley*, 1808 (Am.). See, also, *Williams v. Tyley*, 1858; *In re Harris*, 1864.

⁵ *Hobbs v. Knight*, 1838; *Evans v. Dallow*, 1862. See ante, § 165.

⁶ *Clarke v. Scripps*, 1852 (Sir J. Dodson); *In re Woodward*, 1871; *In re Wheeler*, 1880.

⁷ § 4. See *In re Brewster*, 1860; *Cheese v. Lovejoy*, 1877, C. A.

⁸ § 21.

apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will;¹ but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration,² or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end³ or some other part of the will." The word "apparent" here used, simply applies to what is apparent to ordinary eyesight on the face of the instrument, and does not mean what is capable of being made apparent by extrinsic evidence. Consequently, if a testator, *animo revocandi*, entirely obliterates any part of the will, so that such part of the original will is no longer apparent to ordinary eyesight, this operates as a revocation of that part, and no evidence dehors the will can be received, in order to show how the defaced passage originally stood.⁴ For example, where a testator had covered a bequest in his will by pasting a piece of paper over it, which rendered the original bequest no longer apparent (or visible to ordinary eyesight) on the face of the will, the court declined to order the removal of the paper, and granted probate of the will with the part which was then not "apparent" left in blank.⁵ Again, the erasure by a testator of his own signature, or of the signature of either or both of the witnesses, if done *animo revocandi*, amounts to a revocation of the whole will, and is in fact tantamount to its actual destruction.⁶ It has already been shown⁷ that, in the absence of any direct evidence, it will be presumed that any alteration or erasure in a will was made after its execution, and probate of the will in its original form will consequently be granted.⁸

§ 1070. The provisions of "The Wills Act, 1837," as to the revocation or alteration of wills, notwithstanding § 34,⁹ apply equally to

¹ See ante, § 1050. See, also, *In goods of Shearn*, 1880.

² *In re Wilkinson*, 1881.

³ See *In re Treeby*, 1875.

⁴ *Townley v. Watson*, 1844; *In re M'Cabe*, 1873.

⁵ *Re Horsford*, 1874. As to what happened when some twenty years later it was discovered that the words which had been written beneath the paper had become visible to the ordi-

nary eyesight of a careful observer, they were admitted to probate, see post, § 1071.

⁶ *Hobbs v. Knight*, 1838 (Sir H. Fust); *Evans v. Dallow*, 1862. See, also, *In re Harris*, 1866.

⁷ "Presumptions," ante, § 164.

⁸ *Cooper v. Bockett*, 1844-6, P. C.; *Greville v. Tylee*, 1851, P. C.

⁹ See ante, § 1050.

all wills, whether executed before or after the 1st of January, 1838, provided the act of assumed revocation has been done, or the alteration has been made, after that date.¹ Although the section cited above² does not expressly state that, to effect a revocation of the will or any part of it, the erasure or obliteration must be made with that *intention*, yet it is held that (as under the Statute of Frauds) the *animus revocandi* is indispensable; consequently where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, probate of the will in its original form was decreed, since it was clear that the testator intended only a *substitution*, and not a revocation, of the bequests altered.³ The testator was, in short, considered to have intended a complex act, viz., to undo a previous gift, for the purpose of making another gift in its place. The latter branch of his intention was not effected, and, consequently, no sufficient reason existed for believing that he meant to vary the former gift at all,⁴ and the erasure was treated as an act done by mere mistake, *sine animo cancellandi*.⁵

§ 1071. When this doctrine of dependent relative revocation arises, the court has recourse to any legal proof by which it can ascertain the disposition of the testator. Therefore, in the case already mentioned, in which a testator, to vary the amount of a legacy, had pasted a piece of paper over the sum bequeathed, on which he had written a substituted amount (which not being duly attested could not be taken as part of the will), the court, when (though this was some years after probate of the rest of the will had been granted) it found that the original legacy could be read by the unassisted eyesight, gave effect to the will as originally framed, and admitted to probate the words which⁶ had originally been omitted in the probate.⁷

¹ *Hobbs v. Knight*, 1838; *Countess de Zichy Ferraris v. M. of Hertford*, 1843; *Brooke v. Kent*, 1840, P. C.; *Croker v. M. of Hertford*, 1844, P. C.; *Andrews v. Turner*, 1842.

² § 21, cited ante, § 1069.

³ *Brooke v. Kent*, 1840 P. C.; *Burtenshaw v. Gilbert*, 1774 (Ld. Mansfield); *Onions v. Tyrer*, 1716; *In re Nelson*, 1872 (Ir.); *In re Cockayne*, 1836; *In re Parr*, 1860; *In re*

Harris, 1860; *In re Middleton*, 1865; *In re McCabe*, 1873.

⁴ See *Rawlins v. Rickards*, 1860; *Ibbott v. Bell*, 1865; *Quinn v. Butler*, 1868.

⁵ *Locke v. James*, 1843 (Parke, B.). See *Tupper v. Tupper*, 1855; and ante, § 1063, ad fin.

⁶ See § 1069.

⁷ *Ffinch v. Combe*, 1894. See ante, § 1069, n. ⁶.

§ 1072. "The Wills Act, 1837," enacts, that "no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise¹ than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same;² and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."³ In consequence of this enactment, a conditional will, which has become invalid in consequence of the condition not having been performed, cannot now be established by any evidence of "adherence";⁴ neither can the will of a married woman, which was originally void because it was made without her husband's consent, be set up by any parol recognition made by her subsequently to the husband's death.⁵ Again, the destruction of the revoking instrument is no longer sufficient to revive a former will;⁶ and the question of revival or non-revival from this cause,—which under the old system was a fruitful source of litigation,⁷—can never again arise.⁸

§ 1073. It is next necessary to refer to the statute generally known as Lord Tenterden's Act.⁹ The first section of this Act has already been set out and partially discussed in the Chapter *On Admissions*.¹⁰ It must be read as amended by the Mercantile Law Amendment Act,¹¹ 1856. When so read its provisions are that in actions grounded on simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise in writing* to be *signed by the party chargeable thereby*, or by his

¹ See ante, § 165.

² See *In re Harper*, 1849; *Marsh v. Marsh*, 1861; *Rogers v. Goodenough*, 1862; *In re May*, 1868; *In re Steele, May & Wilson*, 1868; *In re Reynolds*, 1873.

³ 7 W. 4 & 1 V. c. 26, § 22. See *Andrews v. Turner*, 1842.

⁴ *Roberts v. Roberts*, 1862.

⁵ *Id.* (Sir C. Cresswell). See, also, *Willock v. Noble*, 1875, H. L.

⁶ *Major v. Williams*, 1843; *Brown v. Brown*, 1858; *In re Brown*, 1858; *Wood v. Wood*, 1867.

⁷ This question, under the old

system, depended on the intention of the testator, as gathered from the circumstances of each particular case. *James v. Cohen*, 1844 (Sir H. Fust), citing *Usticke v. Bawden*, 1824.

⁸ Except in the very improbable event of a still earlier will having been revoked by a will made before 1st January, 1838, which second will has itself been revoked in some valid manner.

⁹ 9 G. 4, c. 14.

¹⁰ Ante, § 744. See, also, § 600.

¹¹ 19 & 20 V. c. 97, § 13, cited ante, § 745.

authorised agent, or by part payment.¹ The question whether the language employed in each particular case is or is not sufficient to take a case out of the statute is a question for the court.² But having regard to the endless variety of language which may be used, it is obviously impossible to lay down distinct rules of interpretation, by following which a sound decision may be arrived at in every instance. The following ten general principles appear, however, to have been established:—

§ 1074. First, the Act contains nothing to alter the legal construction of acknowledgments or promises made by defendants. It merely requires a different mode of proof, and substitutes the certain evidence of a writing signed by the party chargeable for the insecure and precarious testimony to be derived from the memory of witnesses.³ Every inquiry, therefore, whether a written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation.⁴

§ 1074A. Secondly, to take a case out of the operation of the statute, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and *unqualified* admission of a still subsisting liability, from which a promise to pay *on request* will be implied by law.⁵ The insertion, therefore, of a debt in the statement of assets and debts, made under the bankrupt law by a debtor whose affairs are in course of arrangement, is not a sufficient acknowledgment, as it simply

¹ The law is the same in Ireland; 16 & 17 V. c. 113, § 24, as amended by 19 & 20 V. c. 97, § 13. See *Archer v. Leonard*, 1863 (Ir.); *Leland v. Murphy*, 1865 (Ir.).

² That this is a question for the court, and not for the jury, see ante, § 43.

³ See *Spollan v. Magan*, 1851 (Ir.) (Monahan, C.J.).

⁴ *Haydon v. Williams*, 1830 (Tindal, C.J.).

⁵ *Morrell v. Frith*, 1838 (Parke, B.); *Bucket v. Church*, 1840 (id.); *Tanner v. Smart*, 1827 (Id. Tentenden); *Smith v. Thorne*, 1852; *Everett v.*

Robertson, 1859; *Francis v. Hawkesley*, 1859; *Goate v. Goate*, 1856; *Brigstocke v. Smith*, 1833 (Bayley, J.); *Hart v. Prendergast*, 1845; where *Alderson, B.*, questioned *Gardner v. M'Mahon*, 1842. In *Prance v. Simpson*, 1854, the statute was held to be ousted by a written acknowledgment that an account was pending coupled with a promise to pay the balance, if any should be found due from the writer (*Wood, V.-C.*). See *Hughes v. Paramore*, 1855; *Crawford v. Crawford*, 1867 (Ir.); *In re River Steamer Co.*, Mitchell's claim, 1871.

amounts to an admission of a debt, which is to be paid in part or in some qualified mode.¹

¹ See *Ex parte Topping, Re Levey and Robson*, 1865 (Ld. Cranworth, C.). On the other hand, letters have been held to be *unqualified admissions* of a debt, and to take the case out of the operation of the statute, when they, in substance, contained such expressions as the following:—"I can never be happy till I have paid you; your account is correct, and would that I were now going to inclose the amount" (*Dodson v. Mackey*, 1834);—"I wish I could comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern must be broken up to meet it" (*Bird v. Gammon*, 1837; *Martin v. Geoghegan*, 1850 (Ir.));—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained, I cannot move a step towards giving you satisfaction, and doing justice to my other creditors" (*Gardner v. M'Mahon*, 1842; questioned (*Alderson, B.*) in *Hart v. Prendergast*, 1845. See *Leland v. Murphy*, 1865 (Ir.); *Crawford v. Crawford*, 1867 (Ir.); *Burrows v. Baker*, 1869 (Ir.); *Bewley v. Power*, 1833 (Ir.); and *Prance v. Sympton*, 1854, cited ante, § 1074, n.);—"I will pay you your debt by instalments, but I demur to pay the interest" (*Shah Mukhun Lall v. Nawab Imtiazood Dowlah*, 1865, P. C. See *Wilby v. Elgee*, 1875);—"Your bill does not sufficiently specify the work done, and I shall feel obliged if you will more particularly explain it. I will settle your account immediately; but being at a distance, I want everything explicit. Tell H. to send me the agreements, and I will return them by the first post with instructions to pay, if correct" (*Sidwell v. Mason*, 1837; *Godwin v. Culley*, 1859);—"The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an

account of how it stands" (*Chasemore v. Turner*, 1875 but see *Green v. Humphreys*, 1884, C. A.);—"I shall be obliged to you to send in your account, and can give no further orders till this be done" (*Quincey v. Sharpe*, 1876);—"If you send me the particulars of your account with vouchers, I will examine it and send cheque. But the amount cannot be anything like the amount you now claim" (*Skeet v. Lindsay*, 1877);—"I am ashamed your account has stood so long; I must trespass on your kindness a little longer, till a turn in trade takes place" (*Cornforth v. Smithard*, 1859; *Lee v. Wilmot*, 1866);—"Your demand is not just; I am not in your debt anything like 90%. I will settle the difference when we meet" (*Colledge v. Horn*, 1825; *Edmonds v. Goater*, 1852);—"I have received your letter," [which stated that some items in the bill sent with it were of more than six years' standing]; "P. will attend for me to tax your costs, and one will then know what to pay, the other what to receive" (*Murphy v. Meredith*, 1842 (Ir.), holding the above was *not* a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of costs. See *Archer v. Leonard*, 1863 (Ir.));—"I send you my account, leaving a blank for your counter-demand on me, and beg that you will favour me with the balance" (*Waller v. Lacy*, 1840; *Williams v. Griffith*, 1849);—"I will at any time pay my proportion of the joint debt" (*Lechmere v. Fletcher*, 1833);—"I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for 30%, the balance of your money" (*Dabbs v. Humphries*, 1834. See, also, *Evans v. Simon*, 1853; *Collis v. Stack*, 1857). The older authorities are not here referred to, as few of them are law. They are noticed in 2 St. Ev. 662-667. Letters, in substance as follows, have been held *not* to take the case out of the operation of the statute, as only amounting to *qualified acknow-*

§ 1074_b. Thirdly, a *conditional promise*, in the absence of proof of the fulfilment of the condition, will not suffice; but if such proof be afforded, the promise, whether express or implied, will be converted into an absolute one, and as such will support a statement of claim, averring a promise to pay on request.¹ In the case of a conditional promise the statute begins to run, not from the date of the promise, but from the time when the condition is fulfilled.²

§ 1075. Fourthly, since a mere acknowledgment of a debt, which

ledgment:—"I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive" (*Fearn v. Lewis*, 1830);—"I have been expecting to be able give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter" (*Morrell v. Frith*, 1838; *Hamilton v. Terry*, 1852; *Cawley v. Furnell*, 1852);—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you" (*Linsell v. Bonsor*, 1835);—"I owe the money, but I will never pay it" (*A'Court v. Cross*, 1825);—"I am sure my account was settled; but as you say it was not, I will pay you 10*l.* a year, if you like to accept that sum" (*Buckmaster v. Russell*, 1861);—"If in funds I would immediately pay the money, and take the bill of exchange out of your hands" (*Richardson v. Barry*, 1860);—"I admit as executor your claim on the estate, and think it just, but I am compelled to refuse payment as the legatees object" (*Briggs v. Wilson*, 1854);—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance" (*Hart v. Prendergast*, 1845; *Smith v. Thorne*, 1852; *Rackham v. Marriott*, 1857);—"I send you an account of some debts due to me; collect them, and pay yourself, and you and I shall then be clear" (*Routledge v. Ramsay*, 1838);—"Arrangements have been made to enable me to discharge your debt; funds have

been appointed for that purpose, of which A. is trustee, and to him I refer you for further information" (*Whippy v. Hillary*, 1832; overruling *Baillie v. Ld. Inchiquin*, 1796, as the court admitted in *Routledge v. Ramsay*, 1838);—"Send me in any demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law" (*Spong v. Wright*, 1842. See *Collinson v. Margesson*, 1858; *Cassidy v. Firman*, 1867 (Ir.));—"I will not pay your demand, for it is of more than six years' standing" (*Brigstocke v. Smith*, 1832; *Coltman v. Marsh*, 1811);—"I have sent you a note for the money I owe you," the note so sent being inadmissible in evidence for want of a proper stamp (*Parmiter v. Parmiter*, 1860).

¹ *Humphreys v. Jones*, 1845; *Hart v. Prendergast*, 1845. The following *conditional acknowledgments* have been deemed insufficient, in the absence of proof that the conditions had respectively been fulfilled:—"I cannot pay the debt now, but I will as soon as I can" (*Tanner v. Smart*, 1827; *Haydon v. Williams*, 1830 (*Tindal, C.J.*); *Ayton v. Bolt*, 1827; *Gould v. Shirley*, 1829);—"We are waiting a remittance from Liverpool against beef we want to sell; when it comes, we shall send you the amount of the bill" (*Hodgens v. Graham*, 1831 (Ir.));—"I shall be most happy to pay you principal and interest as soon as convenient" (*Edmunds v. Downes*, 1834; *Meyerhoff v. Froehlich*, 1878, C. A.).

² *Waters v. E. of Thanet*, 1842; *Maunsell v. Hedges*, 1851 (Ir.); *Hammond v. Smith*, 1864.

does not amount in law to an implied promise to pay, will not take a case out of the Statute of Limitations, an admission to a *stranger* that a sum is due will not suffice.¹ Consequently, an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, cannot be made available by a subsequent holder of the note to defeat the Statute of Limitations.²

§ 1075A. Fifthly, a general written promise to pay, not specifying either any amount, or containing any absolute admission of *some* debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages.³

§ 1075B. Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence.⁴

§ 1075C. Seventhly, even an infant, by giving a written acknowledgment of a debt due for *necessaries*, will take such debt out of the statute.⁵

§ 1075D. Eighthly, it matters not under this statute, any more than under the Statute of Frauds,⁶ to what part of the document the signature of the party making the acknowledgment is attached.⁷

¹ Stamford, &c. Bank *v.* Smith, 1892, C. A.; Grenfell *v.* Girdlestone, 1837 (Alderson, B.); Godwin *v.* Culley, 1859; Fuller *v.* Redman, 1859; In re Hindmarsh, 1860; Bush *v.* Martin, 1863. Older authorities, throwing doubt on the proposition in the text, are to be found in Clark *v.* Hooper, 1834 (Tindal, C.J., and Park, J.); Eicke *v.* Nokes, 1834 (Tindal, C.J.); Peters *v.* Brown, 1801 (Ld. Kenyon); Smith *v.* Poole, 1841; Spollan *v.* Magan, 1851 (Ir.); McCarthy *v.* O'Brien, 1839 (Ir.); Morrogh *v.* Power, 1842 (Ir.). See, also, post, § 1091.

² Stamford, &c. Bank *v.* Smith, supra; Cripps *v.* Davis, 1843; Mountstephen *v.* Brooke, 1819. In Bourdin *v.* Greenwood, 1872 (Wickens, V.-C.), the maker of a promissory note bearing date January, 1846, was in 1866 pressed for payment, whereupon he altered the date by converting the 4 of 1846 into a 6, indorsed his name as follows: "W. H. Lang-

ley, 1866," and then returned the note to the holder. In a creditor's suit, the V.-Ch. held that the indorsement was a sufficient acknowledgment to bar the statute, and that the note, notwithstanding the alteration of the date, was still a valid document. Sed qy.

³ Spong *v.* Wright, 1822 (Alderson, B.); Lechmere *v.* Fletcher, 1833; Cheslyn *v.* Dalby, 1840; Waller *v.* Lacy, 1840; Dickinson *v.* Hatfield, 1831 (Ld. Tenterden); Bewley *v.* Power, 1833 (Ir.); and Shickernell *v.* Hotham, 1854, overruling the dicta in Kennett *v.* Milbank, 1831. See Hartley *v.* Wharton, 1840; post, § 1091; and ante, § 1024.

⁴ Hartley *v.* Wharton, 1840; Edmunds *v.* Downes, 1834. See Lobb *v.* Stanley, 1844.

⁵ Willins *v.* Smith, 1854. But see post, § 1084.

⁶ Ante, § 1028.

⁷ Holmes *v.* Mackrell, 1858.

§ 1075E. Ninthly, the promise, acknowledgment, or part-payment, must be made before action brought, since they severally bar the statute, not (as was formerly supposed) because they rebut the presumption of payment, but because they amount to a new promise.¹

§ 1076-8. Tenthly, and lastly, the promise proved, whether express or implied, must correspond with that laid in the statement of claim:² therefore, proof of an acknowledgment to or by an executor or administrator will not support an allegation of a promise to or by the testator or intestate.³

§ 1079. It will be remembered⁴ that a case may be taken out of the Statute of Limitations by a *part-payment*. For a payment to have the effect of doing this, it is not necessary that at the time of the payment the exact amount remaining due should be distinctly ascertained.⁵ Still, it must appear that the payment was made, not only on account of a debt, but on account of *the* debt for which the action is brought. Therefore, if there be two undisputed but entirely separate debts, a part-payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either.⁶ Moreover, it must appear that the payment was made in *part* discharge of the debt declared on; for the meaning of *part-payment* is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum*, due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it.⁷ The circumstances, too, must be such as to warrant the jury in inferring a promise to pay the remainder; and therefore, if part-payment be accompanied by a

¹ Bateman v. Pinder, 1842, overruling Yea v. Fouraker, 1760-1.

² Tanner v. Smart, 1827 (Ld. Tenterden); Cripps v. Davis, 1843 (Parke, B.).

³ Sarell v. Wine, 1803; Browning v. Paris, 1839 (Parke, B.); Tanner v. Smart, 1827.

⁴ See § 1073, supra. The effect of a part payment is not affected by Lord Tenterden's Act, the reason for this being, it would appear, that a part payment is *an act* the meaning of

which cannot be open to any reasonable doubt. See Waters v. Tompkins, 1835 (Parke, B.); Bodger v. Arch, 1854 (id.).

⁵ Walker v. Butler, 1856.

⁶ Burn v. Boulton, 1846. But see Walker v. Butler, 1856. See, also, Nash v. Hodgson, cited post, § 1081.

⁷ Tippetts v. Heane, 1834; Waters v. Tompkins, 1835; Waugh v. Cope, 1840. See Worthington v. Grimsditch, 1845.

positive refusal to pay any more, it will not take the case out of the statute, though the debtor admits that the remainder is due¹. The payment, also, of a dividend under the Bankruptcy law,² or the payment of interest in pursuance of a judgment obtained in a former action, to which the Statute of Limitations has been unsuccessfully pleaded,³ is open to the same objection.

§ 1080. The sale and delivery of goods will not take a case out of the Statute of Limitations, unless done under circumstances which would render the delivery equivalent to payment,⁴ as, for example, under an express agreement by the parties that goods delivered by the one should be taken by the other in part payment of the debt.⁵ The statute would, in such a case, certainly be barred, for the Legislature never intended that the "part-payment" should necessarily be in actual money, but it will suffice if it be made in any mode which the parties agree shall be treated as equivalent to a money payment.⁶ And it has been urged that the sale and delivery of goods which, equally with the payment of money, are acts done, ought to be in general per se sufficient to exempt a debt from the operation of Lord Tenterden's Act; but however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods.

§ 1081. Neither, again, will the mere existence in an open account acerued of items which have arisen within six years, but in respect of which there has not been any actual payment in cash, or anything equivalent to it, take those items of the account which are more than six years old out of the operation of the Statute of Limitations.⁷ Moreover, in such a case, the mere payment by the debtor of a sum generally in respect of the account, without any evidence of an appropriation of it on his part, or of any intention by him to apply it in part discharge of the items

¹ *Wainman v. Kynman*, 1847.

² *Ex parte Topping*, *In re Levey and Robson*, 1865 (Ld. Cranworth, C.); *Davies v. Edwards*, 1851.

³ *Morgan v. Rowlands*, 1872.

⁴ *Cottam v. Partridge*, 1842; overruling *Catlin v. Skoulding*, 1795, as only applicable previously to Lord Tenterden's Act. See, also, *Williams v. Griffiths*, 1835 (Parke, B.).

⁵ *Hart v. Nash*, 1835; *Hooper v. Stephens*, 1835; *Blair v. Ormond*, 1851. See *Hughes v. Paramore*, 1855.

⁶ *Bodger v. Arch*, 1854 (Parke, B.); *Amos v. Smith*, 1867; *Maber v. Maber*, 1867.

⁷ *Cottam v. Partridge*, 1842; *Williams v. Griffiths*, 1835; *Mills v. Fowkes*, 1839; *Waller v. Lacy*, 1840; *Williams v. Griffith*, 1849.

which accrued more than six years before, will not exempt these from the operation of the Statute of Limitations; though, in such case, the creditor may, unless expressly prohibited by the debtor of his own motion, at any time apply the payment to the statute-barred debts.¹ A payment on account of interest generally by a party who is the maker of three promissory notes, two of which are barred by the statute, but the other of which is not barred, must *primâ facie* be attributed exclusively to the note which is not barred.² A statute-barred debt will not be revived merely by an account furnished by one party, even though such account contain cross items, and fix the balance due;³ or by an account containing items on one side only,⁴ being actually stated and settled by both parties, for this will be no more than a mere parol statement of, and promise to pay, an existing debt.⁵ But the going through an account with items on both sides, and striking a balance, is an act equivalent to part-payment, as such a proceeding converts the *set-off* into *payments*, and raises a new consideration for the liquidation of the balance.⁶

§ 1082. The payment, to take the case out of the operation of the statute, may be one either of principal or of interest. But if a debt be made up of sums due on both these accounts, the payment of the principal, if accompanied by a refusal to pay interest, will raise no implied promise to also pay interest.⁷ The payment of interest on a debt barred by the statute, is some evidence that the principal is due, though it does not necessarily prove that fact.⁸ If such payment of interest was coupled with special circumstances, as, for instance, if it was paid upon a note, which was allowed to remain in the hands of the payee, it may be fairly regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal.⁹ A bill drawn in part payment of a debt operates to defeat the statute from the time of its delivery to the

¹ *Mills v. Fowkes*, 1839. See *Re Rainforth*, 1880, C. A.

² *Nash v. Hodgson*, 1856.

³ *Bristow v. Miller*, 1828 (Ir.).

⁴ *Ashby v. James*, 1843 (Alderson, B.), apparently overruling *Smith v. Forty*, 1829 (Vaughan, B.).

⁵ *Jones v. Ryder*, 1838; *Reeves v. Hearne*, 1836; *Hopkins v. Logan*,

1839 (Parke and Alderson, BB.); *Clark v. Alexander*, 1844.

⁶ *Ashby v. James*, 1843.

⁷ *Collyer v. Willock*, 1827.

⁸ *Purdon v. Purdon*, 1842.

⁹ *Bealy v. Greenslade*, 1831; *Bamfield v. Tupper*, 1851; *Re Rutherford*, 1880, C. A.

creditor,¹ and this, too, whether such bill be subsequently honoured or not; for the word "payment" in Lord Tenterden's Act is used in a popular sense, and is large enough to include not only actual cash payments, but also conditional payments.

§ 1083. The courts for many years put a forced, though salutary, construction on Lord Tenterden's Act, and held that the *fact* of payment could not be established by *any admission* of the debtor short of an acknowledgment in writing duly signed.² However, it is now settled that a mere parol acknowledgment, either of part payment of principal, or of payment of interest, within six years, will suffice to take a case out of the Statute of Limitations.³ When the actual fact of some payment having been made has once been proved, recourse can be had to the parol admissions of the debtor, whether made before, or after, or at the time of payment, for the purpose of showing on what account that payment was made.⁴ Reasonable proof must in general be given of the identity of the debt, on account of which the payment was made, with that which forms the subject-matter of the action.⁵ But a jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due.⁶

§ 1084. "The Infants Relief Act, 1874,"⁷ prohibits the bringing of any action "upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." A ratification after the coming into

¹ *Turney v. Dodwell*, 1854; *Irving v. Veitch*, 1837; *Gowan v. Foster*, 1832.

² *Bayley v. Ashton*, 1840; *Willis v. Newham*, 1830; *Maghee v. O'Neil*, 1841; *Eastwood v. Saville*, 1842.

³ *Cleave v. Jones*, 1851. See, also, *Edwards v. Janes*, 1855.

⁴ *Waters v. Tompkins*, 1835; *Bevan v. Gething*, 1842; *Edan v. Dudfield*, 1841 (*Ld. Denman*). See *Baildon v. Walton*, 1847.

⁵ *Waters v. Tompkins*, 1835 (*Parke, B.*).

⁶ *Evans v. Davies*, 1836; *Burn v. Boulton*, 1846. As to the law, where payment is made by one of several

joint debtors, see ante, §§ 744—746.

⁷ 37 & 38 V. c. 62, § 2. This enactment supersedes § 5 of 9 G. 4, c. 14, or *Ld. Tenterden's Act* (which section is actually repealed by 38 & 39 V. c. 66). By § 5 of *Ld. Tenterden's Act* "no action could be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification were made by some writing signed by the party to be charged therewith."

operation of the Act,¹ of a contract made before that date, is within the prohibition contained in the Act.² So also is the ratification of a promise to marry.³ A set-off or counter-claim, arising from an alleged ratification of a contract by an infant, is also within the Act.⁴

§ 1085. By § 6 of Lord Tenterden's Act,⁵ "no action shall be brought, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,⁶ unless such representation or assurance be made in writing, signed by the party to be charged therewith."⁷ This provision was rendered necessary by the well-known case of *Pasley v. Freeman*,⁸ which decided that the provisions of the Statute of Frauds, requiring guarantees to be in writing,⁹ could be evaded by the plaintiff's claim being not upon a special *promise* to him, to answer for the debt or default of another, but upon a *tort* or wrong done by some false or fraudulent representation made by the defendant, in order to induce the contract.

§ 1086. The word "ability," in the above § 6 of Lord Tenterden's Act, has been discussed more than once. In an action¹⁰ against certain trustees, for falsely representing that a life-tenant's interest in certain trust property was only charged with three annuities, whereby the plaintiff was induced to purchase an annuity from such life-tenant, whereas defendant well knew that such life-tenant's interest was also charged with a mortgage of 20,000*l.*, it having appeared at the trial that the representations were by parol,

¹ See *Smith v. King*, 1892.

² *Ex parte Kibble*, Re *Onslow*, 1875.

³ *Coxhead v. Mullis*, 1878. But see *Northcote v. Doughty*, 1879; *Ditcham v. Worrall*, 1880. The fixing of the wedding-day by the parties was regarded as tantamount to a fresh promise.

⁴ *Rawley v. Rawley*, 1876, O. A.

⁵ 9 G. 4, c. 14; now in substance extended to Scotland by 19 & 20 V. c. 60, § 6.

⁶ The word "upon" here is obviously a misprint.

⁷ See *Swift v. Jewesbury*, 1874, C. A. (where the signature of a manager of a banking company was held not the signature of the bank within the meaning of this Act); overruling *Swift v. Winterbotham*, 1873.

⁸ Decided in 1789.

⁹ Ante, §§ 1019, 1330—1034.

¹⁰ *Lyde v. Barnard*, 1836.

the judges of the court were equally divided in opinion as to whether they related to the ability of the life-tenant in question. Parke and Alderson, B.B., thought that they simply had reference to the state of the fund; Lord Abinger and Gurney, B., held that they related to the state of the fund, as an element only of the life-tenant's personal credit, and that the question which they purported to answer was in substance one regarding his ability to give security of adequate value. The latter opinion is somewhat confirmed by a subsequent decision of the Queen's Bench,¹ where a false representation by a solicitor, that his client might be safely trusted, because he had lately purchased an estate, and the title-deeds were in his (the solicitor's) possession, so that the client could do nothing without his knowledge, was held to be a representation respecting the ability of the client, and to, consequently, require to be in writing.

§ 1087. For a representation to come within the Act, it is not necessary that an action should be brought directly upon it. Therefore, where a plaintiff sought in an action for money had and received, to recover the value of goods which, on the defendant's representation as to him, had been sold to a third party, who had then paid their proceeds over to the defendant, it was held that as the plaintiff's case rested on the misrepresentation alone, it fell directly within the Act.² Had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might possibly have been different.³ The Act also applies to a misrepresentation made by one partner respecting the credit of his firm.⁴ When several false representations respecting a man's character have been made by different persons, or when the same person has made one representation in writing and another in conversation, the action will be maintainable, if the jury are of opinion that the plaintiff was mainly or even partially induced by the writing declared on to give the credit which occasioned the loss.⁵

§ 1088. Another case in which it is required by statute that acknowledgments should be in writing and duly signed, is that of

¹ *Swann v. Phillips*, 1838.

⁴ *Devaux v. Steinkeller*, 1839.

² *Haslock v. Fergusson*, 1837.

⁵ *Wade v. Tatton*, 1856.

³ *Id.*

acknowledgments of title to real property relied on to take an adverse possession out of the operation of the Real Property Limitation Acts, 1833¹ and 1874.² By the Act of 1833,³ "an acknowledgment of the title of the person entitled to any land, or rent," must, to neutralize the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent, be "given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in receipt of such rent." By the Act of 1874,⁴ "an acknowledgment in writing of the title of the mortgagor, or of his right of redemption," must, to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be "given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him."⁵ While it is also required,⁶ that "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land⁷ or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for, or release of, the same; unless, in the meantime,⁸ some part of the principal money, or some interest thereon, shall have been paid, or some *acknowledgment* of the right thereto shall have been given in *writing signed by the person by whom the same shall be payable*,⁹ or his *agent*, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within

¹ 3 & 4 W. 4, c. 27; extended to Ireland by 6 & 7 V. c. 54 (as amended by 54 & 55 V. c. 67), and 7 & 8 V. c. 27. See ante, § 74, and n.

² 37 & 38 V. c. 57. See ante, § 74, and n.

³ § 14 of 3 & 4 W. 4, c. 27.

⁴ § 7 of 37 & 38 V. c. 57. Set out verbatim, ante, in note to § 747.

⁵ As to what is a sufficient acknowledgment to satisfy these words, see *Stansfield v. Hobson*, 1852; *Trulock v. Robey*, 1841; *Thompson v. Bowyer*, 1863 (Romilly, M.R.).

⁶ 37 & 38 V. c. 57, § 8, which has been substituted for § 40 of 3 & 4

W. 4, c. 27 (repealed by § 9 of 37 & 38 V. c. 57).

⁷ Money due on a bond executed by an ancestor is not a sum "charged upon, or payable out of, any land," within the meaning of this section: *Roddam v. Morley*, 1857; *Morley v. Morley*, 1856.

⁸ As to the meaning of these words, see *Harty v. Davis*, 1850 (Ir.).

⁹ As to the meaning of these words, see and compare *Toft v. Stephenson*, 1851; *Pears v. Laing*, 1871 (Bacon, V.-C.); *Bolding v. Lane*, 1863; and *In re Fitzmaurice*, 1864 (Ir.).

twelve¹ years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.”²

§ 1089. No acknowledgment of any title mentioned in these Acts will be operative to restore such title after it has once been extinguished by the effluxion of time.³ The acknowledgments, also, must be distinct and unconditional. An acknowledgment conditional on an arrangement which was never carried into effect cannot be regarded as an acknowledgment of title within the Act of 1833.⁴ Where, however, an acknowledgment is distinct, no objection can be taken to it on the ground that it was obtained by compulsion and given upon oath. Therefore, an answer to a bill in Chancery under the old pleading, acknowledging the plaintiff's title, is sufficient.⁵

§ 1090. Actions for debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognizance, must be brought within twenty years after the cause of such actions or suits.⁶ And “if any acknowledgment shall have been made, either by *writing signed* by the *party liable* by virtue of such indenture, specialty, or recognizance, or *his agent*, or by part-payment⁷ or part-satisfaction, on account of any principal or interest being then due thereon,” the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment.⁸

§ 1091. In acknowledgments by signed writings under this Act, the amount need not be specified (any more than in acknowledgments under Lord Tenterden's Act); but if *anything* be due, the amount may be proved by parol evidence.⁹ Such an acknowledg-

¹ See *Sutton v. Sutton*, 1882; *Fearnside v. Flint*, 1882.

² See 23 & 24 V. c. 38 (“The Law of Property Amendment Act, 1860”), § 13, as to claims to the estates of persons dying intestate; also, *Reed v. Fenn*, 1866.

³ *Sanders v. Sanders*, 1882, C. A.

⁴ *Doe v. Edmonds*, 1840. See *Doe v. Beckett*, 1843, and cases cited in the last five notes.

⁵ *Goode v. Job*, 1858.

⁶ See “The Act for the Amendment of the Law, 1833,” being 3 & 4 W. 4, c. 42, § 3, cited ante, § 75B, n. 2. The Irish Act (16 & 17 V. c. 113) contains a somewhat similar provision, in § 20.

⁷ See *Ashlin v. Lee*, 1875 (L.J.J.).

⁸ 3 & 4 W. 4, c. 42 (“The Act for the Amendment of the Law, 1833”), § 5; and 16 & 17 V. c. 113, § 23, Ir.

⁹ *Howcutt v. Bonser*, 1849 (*Parke, B.*). See ante, § 1075.

ment, too, need not amount to a promise to pay,¹ though it must contain an admission of an actually existing debt, and will not suffice if it merely shows that a debt was due at some prior time.² It will (unlike admissions of simple contract debts under the old Statute of Limitations)³ be sufficient if addressed to a third party.⁴ So that a recital by a mortgagor, in an assignment of his equity of redemption, that all interest was paid upon a mortgage, was in an action by the mortgagee against the mortgagor on the original mortgage deed, within twenty years from the date of the assignment, held to be ample evidence of an acknowledgment by part-payment of interest, so as to take the case out of the statute.⁵ In the same case it was also held that the payment to the mortgagee by the assignee, in pursuance of a covenant so to do contained in it, of interest accrued subsequently to the assignment, was a sufficient acknowledgment as against the mortgagor.⁶

§ 1092. By the *Prescription Acts*,⁷ claims to rights of common and other profits à prendre,⁸ to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after the lapse of certain defined periods, unless it shall appear that the respective privileges were enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing."

§ 1093. By "The Railway and Canal Traffic Act, 1854,"⁹ no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable, and signed by such party, or by the person delivering such things for carriage.¹⁰

¹ *Moodie v. Bannister*, 1859 (Kendersley, V.-C.). See ante, § 1075.

² *Howcutt v. Bonser*, 1849.

³ See ante, § 1075.

⁴ *Moodie v. Bannister*, 1859; resolving a point left undecided in *Howcutt v. Bonser*, 1849. See *Wilby v. Elgee*, 1875 (Ir.).

⁵ *Forsyth v. Bristowe*, 1853.

⁶ *Id.*

⁷ 2 & 3 W. 4, c. 71 ("The Prescription Act, 1832"), §§ 1—3, extended to Ireland by 21 & 22 V.

c. 42; 2 & 3 W. 4, c. 100, § 1. See ante, § 75A, n.

⁸ The Act does not apply to profits à prendre in gross: *Shuttleworth v. Le Fleming*, 1865; or to rights claimed by a copyholder in his own tenement according to the custom of the manor: *Hanmer v. Chance*, 1865.

⁹ 17 & 18 V. c. 31, § 7; *Gregory v. W. Midl. Rail. Co.*, 1864.

¹⁰ See *Wise v. Gt. West. Rail. Co.*, 1856; *Simons v. Gt. West. Rail. Co.*,

§ 1094. An acceptance of a bill is by The Bills of Exchange Act, 1882,¹ invalid, unless, among other conditions, "it be written on the bill and be signed by the drawee;" but "the mere signature of the drawee without additional words is sufficient."

§ 1095. By the Truck Acts, 1831 to 1887,² no stoppage or deduction shall in any case be made from the wages of any artificer protected by that statute, unless the agreement "for such stoppage or deduction shall be in writing, and signed by such artificer."³

§ 1096. A "declaration in writing" by such "lodger"⁴ to the effect stated in such Act is, by the "Lodgers Protection Act,"⁵ necessary to be made by a lodger who seeks to protect his goods from being distrained upon for rent due to the superior landlord. To such declaration must⁶ be annexed a correct inventory subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration. The declaration will be inoperative, unless made *after* the distress has been levied, or at least, authorised or threatened.⁷

§ 1097. An agreement "in writing, signed by the person to be bound thereby or by his agent in that behalf," is, by the "Solicitors Remuneration Act, 1881,"⁸ required as evidence of any contract between a solicitor and his client as to the form and amount of remuneration to be paid for professional services rendered in conveyancing or other non-contentious business out of court. Any special agreement between a solicitor and his client "respecting the amount and manner of payment" for such solicitor's services, whether past or future, is by the "Attorneys'

1857; Lond. & N. West. Rail. Co. v. Durham, 1856; Pardington v. S. Wales Rail. Co., 1856; Peek v. N. Stafford. Rail. Co., 1863, H. L.; *McManus v. Lanc. & Yorkshire Rail. Co.*, 1859; *Lewis v. Gt. West. Rail. Co.*, 1860, C. A.; same name, but different case, 1877, C. A.; *Beal v. S. Devon Rail. Co.*, 1864; *Lloyd v. Waterford & Lim. Rail. Co.*, 1862 (Ir.).

¹ 45 & 46 V. c. 61, § 17.

² 1 & 2 W. 4, c. 37; 50 & 51 V. c. 46.

³ See §§ 23, 24 of 1 & 2 W. 4, c. 37. On its construction, see *Cutts v. Ward*, 1867; *Pillar v. Llynvi Coal Co.*, 1869.

⁴ As to the meaning of the word "lodger," see *Phillips v. Henson*, 1877; but *quære*. See, also, *Heawood v. Bone*, 1884.

⁵ 34 & 35 V. c. 97, § 1.

⁶ It is, however, not quite clear whether the declaration must be "subscribed" as well as the inventory.

⁷ *Thwaites v. Wilding*, 1883.

⁸ 44 & 45 V. c. 44, § 8.

and Solicitors' Act, 1870,"¹ required to be in *writing*, and be signed by both parties,² and must be pronounced, either by the taxing master or by the court, to be fair and reasonable. An undertaking by a solicitor to "charge nothing if he lost the action," does not fall within these provisions, and need not be in writing.³

§ 1093. An agreement in writing is by "The Merchant Shipping Act, 1894,"⁴ required to be entered into by the master of every ship⁵ with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, which must be in a form sanctioned by the Board of Trade,—must be dated at the time of the first signature being attached to it,—must contain a variety of particulars specified in the Act,—and must be signed first by the master and afterwards by the seaman; and the signature of the seaman to which must be duly attested in the case of a foreign-going ship by a shipping-master, and in the case of a home-trade ship, either by a shipping-master or by some other witness; and in either event, read over and explained to him, before the seaman executes the instrument, or, at least, ascertained by the witness to be understood by him. The same statute also enacts⁶ that "every indenture of apprenticeship to the sea service made in the United Kingdom by a board of guardians, or persons having the authority of a board of guardians, shall be executed by the boy and the person to whom he is bound in the presence of, and shall be attested by, two justices of the peace, and those justices shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

¹ 33 & 34 V. c. 28, §§ 4, 9.

² *Re Lewis, Ex parte Munro*, 1876. Such an agreement cannot, indeed, be enforced by action (see 33 & 34 V. c. 28, § 8), but the remuneration agreed upon may, if the terms be fair and reasonable, be recovered in a summary way.

³ *Jennings v. Johnson*, 1873.

⁴ 57 & 58 V. c. 60, §§ 113—116. As to how the agreement is to be attested if the seaman is engaged in a colonial or foreign port, see § 124. As to what attestation is necessary

when the agreement is altered by the consent of all parties, see § 122. As to how releases between master and seaman are to be attested and proved, see § 138. As to agreements by sea fishermen with boys under sixteen, and apprenticeships to the sea fishing service, see §§ 369—371, 391—408, 412.

⁵ Ships of less than eighty tons, exclusively employed in the coasting trade, excepted.

⁶ By § 107.

§ 1099. It is necessary by "The Pawnbrokers Act, 1872,"¹ in every case of a special contract by a pawnbroker with a pawner, that a special ticket signed by the pawnbroker be delivered to the pawner, and that the pawner sign a duplicate of such ticket. Special contracts may only be made by pawnbrokers with pawners as to pledges for loans above 40s.

§ 1099A. Under both the Dublin and London Hackney Carriage Acts,² a contract in writing, signed by such driver or conductor in the presence of a competent witness, is required to enable a proprietor of such carriages to enforce the payment of any sum, claimed from any driver or conductor on account of his earnings.

§ 1100. An order for the reception of a lunatic will be only valid if duly made in writing on one of the forms given in the Schedule to the Lunacy Act, 1890.³

§ 1101. By the Bankruptcy Act and Rules of 1886 and 1890,⁴ a general proxy must be in writing in a form provided, and in favour of either the Official Receiver, or the manager, or clerk, or other person in the regular employ of the creditor;⁵ though a special proxy may be in favour of any one whom the creditor thinks fit to name,⁶ while in either case such writing must be signed by the creditor and attested by a witness,⁷ and all blanks in it must be filled up in the creditor's own handwriting, or in that of a clerk or manager in his regular employment, or of a Commissioner to administer oaths in the Supreme Court.⁸ The agent of a corporation may fill up blanks, and sign for his principals, but he must expressly state that he is "duly authorised under the seal of the company."⁹ It is further required that voting letters, which are now available by creditors who have proved their debts, for the purpose of assenting to, or dissenting from, a debtor's or a bank-

¹ 35 & 36 V. c. 93, § 24. Tickets and duplicates under this Act are exempt from stamp duty by § 24 of the Act.

² 6 & 7 V. c. 86 ("The London Hackney Carriages Act, 1843"), § 23; 16 & 17 V. c. 112, § 36, Ir. Under the London Act the agreement requires no stamp. § 23.

³ 53 V. c. 5.

⁴ See Sched. 1 of 1883 Act (46 & 47 V. c. 52), rr. 15—21; see, also, Bkpty Rules, 1886 and 1890.

⁵ Sched. 1 of Act of 1883, rr. 17, 21.

⁶ Sched. 1 of Act of 1883, and § 22, clause 3, of Bankruptcy Act, 1890.

⁷ For form of general proxy, Form 75; form of special proxy, Form 76.

⁸ Bankruptcy Act, 1890 (53 & 54 V. c. 71), § 22, subs. 1.

⁹ See Forms 75, 76.

rupt's proposal for a composition or a scheme of arrangement, shall be in a prescribed form, and signed and witnessed.¹

§ 1101A. Every notice to quit to be served on a tenant of a holding, must, under "The Landlord and Tenant, Ireland, Act, 1870,"² be in writing or print, bearing a half-crown stamp, "and signed by the landlord or his agent lawfully authorised thereunto."

§ 1102. All notices of objection to persons remaining on the list of Parliamentary voters, must³ be individually signed at the foot of the notice by the person objecting; and if the notice is sent by the post, and the service of it is sought to be established by the production of a duplicate stamped at the Post-office, this duplicate must be personally subscribed, and externally directed, in the same manner as the copy sent.⁴ Under the same Act, notices of intention to prosecute an appeal, whether transmitted to the Central Office of the Supreme Court, or sent to the respondent, must be signed by the appellant himself.⁵

§ 1102A. It is again required by a further Act,⁶ that all Notices of Appeal to any court of general or quarter sessions, other than those against summary convictions, orders of removal, orders under any statute relating to pauper lunatics, orders in bastardy, or any proceedings by virtue of any Act relating to the revenue, shall specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his solicitor on his behalf.

§§ 1103-4. A pauper cannot, under the Poor Law Amendment

¹ 53 & 54 V. c. 71, § 3, subs. 4, and Form 82.

² 33 & 34 V. c. 46, § 58, Ir.

³ By 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), § 7, and Sched. A., Nos. 4 and 5, as to counties; § 17, Sched. B., Nos. 10 and 11, as to cities and boroughs: *Toms v. Cuming*, 1845; *Pruen v. Cox*, 1845. As to the Irish law, see 13 & 14 V. c. 69, §§ 26, 36.

⁴ 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), § 100; *Toms v. Cuming*, 1845; *Birch v. Edwards*, 1847; *Lewis v. Roberts*, 1861; *Smith v. James*, 1861. See *Barclay v. Parrott*, 1856; *Benesh v. Booth*, 1864. See, also,

13 & 14 V. c. 69 ("The Representation of the People (Ireland) Act, 1850"), § 113, as to the Irish law.

⁵ 6 & 7 V. c. 18 ("The Parliamentary Voters Registration Act, 1843"), § 62; *Petherbridge v. Ash*, 1846. See *Rawlins v. West Derby*, 1846. As to the Irish law, see 13 & 14 V. c. 69, § 75.

⁶ 12 & 13 V. c. 45 ("The Quarter Sessions Act, 1849"), §§ 1, 2. See, also, 47 & 48 V. c. 43 ("The Summary Jurisdiction Act, 1884"), Sched. In *R. v. JJ. of Kent*, 1873, the Court held that the statute was complied with though the notice of appeal was signed only by the clerk of appellants' attorney. *Sed qy.*

Acts,¹ be removed from one parish to another, unless by written consent, until twenty-one days after notice of chargeability *in writing*, accompanied by a copy or counterpart of the order of removal, and by a statement of the grounds of removal under the hands of *the overseers or guardians of the parish* obtaining such order, or any *three or more of such guardians*, shall have been sent by them through the post or otherwise to the overseers of the parish to whom any such order shall be directed. Moreover, no appeal can be heard against such an order, unless the *overseers or guardians* of the appellant parish, or any three or more of such *guardians*, shall have sent or delivered to the overseers of the respondent parish *a statement in writing under their hands* of the grounds of appeal with the notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried.² In construing these provisions it has been held that, although notices of appeal may be signed by the solicitor on behalf of the appellant parish,³ notices of chargeability, and statements of grounds of removal and of appeal, must respectively bear the signatures of the overseers or guardians.⁴ They will, however, be valid if signed by a majority of the aggregate body of the overseers and churchwardens;⁵ though they must be signed by at least such a majority.⁶ Still, it is not necessary that the document should show on its face that it proceeds from a majority of the parish officers,⁷ but it is certainly very desirable that this fact should appear.⁸ The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed⁹ to act for particular parishes.¹⁰ As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is pre-

¹ 4 & 5 W. 4, c. 76, § 79; 11 & 12 V. c. 31 ("The Poor Law Procedure Act, 1847"), §§ 2, 9.

² 4 & 5 W. 4, c. 76, § 81. Both the notice of appeal, as also the statement of grounds of appeal, may be transmitted through the post (14 & 15 V. c. 105, or "The Poor Law Amendment Act, 1851," § 10), and the fourteen days will be calculated from the time when, according to the usual course of post, the notice ought to reach the respondents: *R. v. Slawstone*, 1852.

³ *R. v. Middlesex*, 1850; *R. v. Carew*, 1850.

⁴ *R. v. Derby*, 1850 (Patteson, J.); *R. v. Middlesex*, 1850 (id.); *R. v. Worcester*, 1838; *R. v. Surrey*, 1844.

⁵ *R. v. Warwickshire*, 1837; *R. v. Derbyshire*, 1837.

⁶ *R. v. Westbury*, 1844.

⁷ *R. v. Colerne*, 1850.

⁸ *R. v. Westbury*, 1844.

⁹ Under 4 & 5 W. 4, c. 76.

¹⁰ *R. v. Surrey*, 1844; *R. v. Lambeth*, and *R. v. Southampton*, 1845.

cluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face.¹

§ 1105. By the Metropolis Management Act, 1855,² it is enacted that "every notice, demand, or like document given by or on behalf of the Metropolitan Board of Works, or any vestry or district Board under that Act, may be in writing or print, or partly in writing and partly in print, and shall be sufficiently authenticated if signed by their clerk, or by the officer by whom the same is given."³

§ 1105A. It is also, by the Companies Act, 1862,⁴ enacted that "any summons, notice, order, or proceeding requiring authentication by the Company, may be signed by any director, secretary, or other authorised officer of the Company, and need not be under the common seal of the Company, and the same may be in writing or in print, or partly in writing and partly in print."

§ 1105B. Similar provisions to those already cited may be found in a multitude of other statutes.⁵

§ 1106. Warrants and other instruments issuing from the *Treasury* may now in all cases be issued under the hands of any two or more of the commissioners.⁶ A like convenient rule has been adopted in reference to all orders and other documents emanating from the Commissioners of Customs.⁷ Again, the rules, orders, or regulations of the Local Government Board for England, will be valid if made under seal, and signed by the president or one of the ex officio members, and countersigned by a secretary or his assistant.⁸ The validity of rules and orders made by the Local Government Board for Ireland,⁹ or by the late Irish Poor Law Commissioners¹⁰ will be also found to depend on somewhat similar provisions.

§ 1107. Whenever it is sought to know whether, when an Act of Parliament renders the signature of a person necessary, a signa-

¹ R. v. Leominster, 1845.

² 18 & 19 V. c. 120, § 222.

³ See *In re Balls and Met. Board of Works*, 1866.

⁴ 25 & 26 V. c. 89, § 64.

⁵ See, for example, "The Telegraph Act, 1878" (41 & 42 V. c. 76, § 12).

⁶ 12 & 13 V. c. 89 ("The Treasury Instruments (Signature) Act, 1849").

⁷ 39 & 40 V. c. 36 ("The Customs

Consolidation Act, 1876"), § 10.

⁸ 34 & 35 V. c. 70 ("The Local Government Board Act, 1871"), § 5.

⁹ 35 & 36 V. c. 69 ("The Local Government Board (Ireland) Act, 1872"), § 4, Ir.

¹⁰ 10 & 11 V. c. 90 ("The Poor Relief (Ireland) Act, 1847"), §§ 3, 12, 18, Ir., as amended by 19 & 20 V. c. 14, Ir.

C. III.] WHAT DOCUMENTS MAY BE SIGNED BY AGENTS.

ture by his agent or by procuration will suffice, particular attention must of course be paid to the language employed by the Legislature in each case. In some cases the signature of an agent will not suffice at all.¹ In other cases, though the paper may be signed by an agent, yet his *authority* to do so must be *evidenced in writing*.² In yet further cases, agents to sign the documents are *not required to act under any written authority*.³

§ 1108. Even though an agent has acted in the first instance without any authority whatever, a subsequent recognition, even merely by conduct, of his act by the principal will satisfy the respective statutes.⁴

§ 1109. The application of these rules rests on no principle, but is the result of arbitrary, if not of accidental, legislation. Its result is, in some cases, absurd. Thus, while no action can be brought against a man for falsely representing his friend to be a person of substance, *unless such representation be in writing signed by himself*, any person may be sued on an ordinary guarantee to be answerable for another's debt, *if the promise to pay be given in writing by his authorised agent*.⁵ An agent cannot bind his principal by surrendering a lease not exceeding the term of three years,

¹ Stated alphabetically, some of the more important of the cases in which the signature of an agent will not suffice at all are as under:—Frauds, § 7 of the Statute of (supra, § 1016); Hackney Carriage Acts for London and Dublin (supra, § 1099A); Lord Tenterden's Act (supra, § 1085); "The Merchant Shipping Act, 1894" (supra, § 1098); "The Pawnbrokers Act, 1872" (supra, § 1099); "The Prescription Act, 1832" (supra, § 1092); Real Property Limitation Acts (supra, § 1088); and see Corp. of London v. Judge, 1847; "The Sculpture Copyright Act, 1814" (34 G. 3, c. 56, § 4); "The Voters Registration Act" (supra, § 1102).

² For instance, this is expressly required in the 1st and 3rd sections of the Statute of Frauds (ante, §§ 1001, 1003), and also in the 3rd section of the Act relating to copyright in paintings, drawings, and photographs (25 & 26 V. c. 68 ("The Fine Arts Copyright Act, 1862").)

³ Stated alphabetically, some of the

principal of the cases in which the signature of an agent need not be in writing are those under:—"Act for the Amendment of the Law, 1833" (supra, § 1090); Baines's Act (12 & 13 V. c. 45, § 1, supra, § 1102A); "The Dramatic Copyright Act" (3 & 4 W. 4, c. 15, as to construction of which see Morton v. Copeland, 1855), while as to "The Sculpture Copyright Act," see supra, note to § 1107); Frauds, § 4 of the Statute of (as to which see Heard v. Pilley, 1869, and Cave v. Mackenzie, 1877); Frauds, § 17 of the Statute of (supra, §§ 1019, 1020); "The Mercantile Law Amendment Act, 1856" (supra, § 1073); "The Railway and Canal Traffic Act, 1854" (supra, § 1093; and see Aldridge v. G. W. Ry., 1864); and "The Real Property Limitation Act, 1874" (supra, § 1088).

⁴ Maclean v. Dunn, 1828; Gosbell v. Archer, 1835; Fitzmaurice v. Bayley, 1856.

⁵ Lyde v. Barnard, 1836 (Gurney, B.).

unless he be duly authorised in writing, but may enter into a contract for the sale of lands or of merchandise, whatever their respective values,¹ under a mere oral authority. An *auctioneer*,² however, is, at the time of the auction,³ regarded as the agent of both vendor and purchaser (whether the subject of the sale be lands or goods), and if a complete contract can be made out from the memoranda and entries at the auction signed by him, it is sufficient to bind them both.⁴ A broker, too, is generally considered to be the agent of both buyer and seller; but a factor, except under special circumstances, is the agent of the seller alone.⁵

§ 1109A. From these latter examples it may be perceived that there is no rule to prevent any man from signing a document in a double capacity, first, as agent for one of the contracting parties, and next, in his own right.⁶ Neither is it necessary in such a case that he should sign his name twice over, but the law will be satisfied, if it can be proved by parol evidence that, although apparently signing as a mere agent, he really intended to bind himself as well as his principal.⁷

§ 1110. Besides the Acts noticed above (and many others of a like nature), by which various transactions are required to be evidenced by writing, numerous other statutes render it necessary to the validity of certain documents that they should be executed or attested in a particular form.⁸ Two or more credible witnesses are, for instance, necessary to attest registers of marriages, whether in this country,⁹ or,—since the 1st of January, 1852,—in India;¹⁰ assignments¹¹ of bail bonds; ¹² the protest by any person other than

¹ See ante, §§ 1003, 1019, 1020; Sug. V. & P. 145; and *Hunter v. Parker*, 1840, as reported 7 M. & W. 343.

² This does not, save under special circumstances (see *Bird v. Boulter*, 1833), extend to the auctioneer's clerk: *Peirce v. Corf*, 1874.

³ But at that time only: *Mews v. Carr*, 1856.

⁴ *Emmerson v. Heelis*, 1809; *White v. Proctor*, 1811; *Kenworthy v. Schofield*, 1824; *Wood v. Midgley*, 1854; *Carrigy v. Brock*, 1871 (Ir.); *Peirce v. Corf*, 1874; *Rishton v. Whatmore*, 1878; Sug. V. & P. 146, 147.

⁵ See *Darrell v. Evans*, 1862. See ante, § 1020, n.

⁶ *Young v. Schuler*, 1883, C. A.

⁷ *Young v. Schuler*, 1883, C. A.

⁸ As to the mode of executing deeds under powers, see 22 & 23 V. c. 35 ("The Law of Property Amendment Act, 1859"), § 12.

⁹ 6 & 7 W. 4, c. 85 ("The Marriage Act, 1836"), § 23; 6 & 7 W. 4, c. 86 ("The Births and Deaths Registration Act, 1836"), § 31.

¹⁰ 14 & 15 V. c. 40, § 11.

¹¹ It is now finally decided that assignments of copyright, though granted before the 1st of July, 1842, (when 5 & 6 V. c. 45 ("The Copyright Act, 1842"), came into operation) do not require to be attested by two witnesses. See *Cumberland v. Cope-*

¹² 4 A. c. 16, § 20.

a notary public, of a bill of exchange, whether such protest be for non-acceptance or non-payment;¹ memorials of deeds registered under the Middlesex Registration Act;² the deed of a father appointing a guardian of his child;³ all deeds by which new trustees of property conveyed for religious or educational purposes may now be appointed;⁴ and conveyances to charitable uses under the Mortmain Act.⁵ Under the Bills of Sale Acts, 1878 and 1882, "the execution of every bill of sale by the grantor must be attested by one or more credible witness or witnesses, not being a party or parties thereto;⁶ but, since the 18th of August, 1882,—except in the case of an *absolute* bill of sale,⁷—it is no longer necessary, as it was under the Act of 1878,⁸ that any such witness should be a solicitor.⁹ And every lease made under "The Leasing Powers Act for religious worship in Ireland, 1855," must be "by indenture, sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness," although, singularly enough, the statute does not require that such witness should attest the instrument by attaching his signature to it.¹⁰

§ 1111. It is, moreover, enacted by the English Debtors Act, 1869,¹¹ and the Irish Debtors Act, 1872,¹² that "a *warrant of attorney* to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall not be of any force, unless there is present some [solicitor] of one of the superior courts on

land, 1861, Ex. Ch. See, also, Jefferys v. Boosey, 1854, H. L.; and Kyle v. Jeffreys, 1859, H. L. (Ld. Wensleydale).

¹ 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), §§ 51, 52, 94, and Sched. 1. These protests, so far as inland bills are concerned, are very unusual, and of little, if any, use. See Windle v. Andrews, 1819.

² 7 A. c. 20 ("The Middlesex Registry Act, 1708"), § 1, amended by "The Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 64); R. v. Reg. of Deeds for Middlesex, 1859.

³ 12 C. 2, c. 24, §§ 8, 9, as amended by "The Statute Law Revision Act, 1888" (51 V. c. 3). The guardian himself may be one of the witnesses: Morgan v. Hatchell, 1855 (Romilly, M.R.).

⁴ 13 & 14 V. c. 28 ("The Trustee Appointment Act, 1850"), extended by 53 & 54 V. c. 19.

⁵ See Wickham v. M. of Bath, 1865.

⁶ 45 & 46 V. c. 43, § 10; 46 V. c. 7, § 10, Ir.

⁷ Casson v. Churchley, 1884; Swift v. Pannell, 1883.

⁸ 41 & 42 V. c. 31, § 10.

⁹ 45 & 46 V. c. 43, § 10; 46 V. c. 7, § 10, Ir.

¹⁰ 18 & 19 V. c. 39, § 10, which enacts also, that "the counterpart of every such lease shall be executed by the lessee thereof." These words would seem to preclude an agent from executing the counterpart under a power of attorney from the lessee.

¹¹ 32 & 33 V. c. 62, § 24.

¹² 35 & 36 V. c. 57, § 23.

behalf of such person, *expressly named by him*, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which [solicitor] shall subscribe his name as a witness to the due execution thereof, and *thereby declare himself to be [solicitor] for the person executing the same, and state that he subscribes as such [solicitor.]*" And no warrant or cognovit executed in any other manner shall be "rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."¹

§ 1112. The attesting witness to a warrant of attorney or cognovit must be an actual solicitor,² though it is not necessary for him to have taken out his certificate.³ But a defendant who introduces a person as a solicitor will be estopped from afterwards denying his character, at least, unless he can clearly show that he acted in ignorance.⁴ The solicitor attending on behalf of the defendant must be some person other than the legal adviser, or the agent of the legal adviser, acting for the plaintiff;⁵ and though the statute does not require that the plaintiff should employ a solicitor, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single solicitor being present, that he was acting exclusively on behalf of the defendant.⁶ It is not necessary that the solicitor should be originally or spontaneously named by the defendant, or should come to the place of meeting at his request; but if he remains there at the defendant's request, and is clearly and expressly adopted by him as his solicitor, this will suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser.⁷ Still, as an introduction from such a quarter will always be regarded with distrust, and may often, when taken in con-

¹ 32 & 33 V. c. 62, § 25; 35 & 36 V. c. 57, § 24, Ir.

² Paul v. Cleaver, 1810.

³ Holgate v. Slight, 1851.

⁴ Cox v. Cannon, 1838; Jeyes v. Booth, 1797; Wallace v. Brockley, 1837; Price v. Carter, 1845.

⁵ Mason v. Kiddle, 1839; Rising v. Dolphin, 1840; Pryor v. Swaine, 1844; Hirst v. Hannah, 1851.

⁶ Sanderson v. Westley, 1840 (Alderson, B.); Cooper v. Grant, 1852; Hirst v. Hannah, 1851; Walsh v. Nally, 1877 (Ir.).

⁷ Walton v. Chandler, 1845; Taylor v. Nicholls, 1840; Bligh v. Brewer, 1834; Oliver v. Woodroffe, 1839; Pease v. Wells, 1840; Joel v. Dicker, 1847; Nolan v. Gumley, 1863 (Ir.).

junction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his solicitor to interfere in this manner;¹ and the imprudence of such a course will be more apparent, when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his solicitor, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it.²

§ 1113. The solicitor who attests it is not bound to read the warrant of attorney or cognovit over to his client unless desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived if the client does not require it.³ The subscription by the witness must be an actual visible subscription; and a retracing of a previous attestation and signature with a dry pen is not sufficient.⁴ The law does not prevent the solicitor to whom a warrant is addressed, and who is therefore entitled to enter up judgment upon it, from acting as solicitor for the defendant to attest the execution.⁵ Lastly, in the memorandum of attestation the subscribing witness must distinctly state, first, that he is the solicitor of the party executing the instrument, and next, that he subscribes as such.

§ 1114. No precise form of words is indeed necessary. But those used must enable the courts, either directly or by necessary inference, to collect *both* the facts above stated to be necessary.⁶ Where, therefore, the attestation does not *distinctly* state that the witness subscribed as the defendant's attorney, the instrument is invalid.⁷

§ 1115. Where, however, the attestation distinctly states the attesting solicitor to be the defendant's solicitor, the instrument will be valid.⁸

¹ Taylor v. Nicholls, 1840 (Parke, B.).

² Gripper v. Bristow, 1840; Barnes v. Pendrey, 1839; Walker v. Gardner, 1832.

³ Taylor v. Nicholls, 1840 (Parke, B.); Oliver v. Woodroffe, 1839 (Parke, B.); Joel v. Dicker, 1847.

⁴ Bailey v. Bellamy, 1841. See ante, § 1052.

⁵ Levinson v. Syer, 1852.

⁶ Hibbert v. Barton, 1842 (Parke, B.).

⁷ See invalid forms in Poole v. Hobbs, 1839 (Coleridge, J.); recognized in Everard v. Poppleton, 1843, as reported 5 Q. B. 184. See, also, Potter v. Nicholson, 1841; Everard v. Poppleton, 1843; Lucey v. Murphy, 1873 (Ir.); Hibbert v. Barton, 1842. See, also, Pocock v. Pickering, 1852; Elkington v. Holland, 1842.

⁸ See examples of valid forms in

§ 1116. Where the person executing a warrant of attorney, or cognovit, is *himself a solicitor*, he may dispense with the presence of another solicitor on his behalf; for solicitors being expressly selected to impart information to others respecting the nature of these instruments, are presumed to require no advice on such a subject; as they are consequently not within the mischief of the statute, its provisions do not apply to them.¹

§ 1116A. The Act extends to warrants of attorney executed abroad, and sought to be enforced in this country, since the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home.² The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate to personal actions. The result is, that if a defendant in an action to recover land gives a warrant of attorney to confess judgment, no statutory execution is required;³ but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act.⁴

§ 1117. The above provisions were made exclusively for the benefit of defendants, and therefore third parties, even though prejudiced by them, cannot object to warrants of attorney, or cognovits, given by their debtors on the ground that no solicitor attested their execution.⁵ Even a surety cannot get a judgment entered up on a warrant of attorney, executed by a principal and his sureties, set aside on the ground that the warrant was irregularly executed.⁶

§ 1119. In conclusion, a few of the principal statutes, which either require or permit the *enrolment* or registration of particular instruments, may be properly noticed.⁷ Amongst others of these,

Lewis v. Lord Kensington, 1846; Phillips v. Gibbs, 1846; Gay v. Hill, 1849; Nolan v. Gumley, 1863 (Ir.); Lindley v. Girdler, 1843 (Patteson, J.); Knight v. Hasty, 1843; recognized in Everard v. Poppleton, 1843, as reported 5 Q. B. 183. See, further, Ledgard v. Thompson, 1843.

¹ Chipp v. Harris, 1839; Downes v. Garbutt, 1843 (Coleridge, J.).

² Davis v. Trevanion, 1845 (Wightman, J.).

³ Doe v. Kingston, 1841 (Patteson, J.).

⁴ Doe v. Howell, 1840.

⁵ Chipp v. Harris, 1839. See Pinches v. Harvey, 1841.

⁶ Price v. Carter, 1845.

⁷ As to the general mode of proof of enrolments, see post, §§ 1646 and 1647.

the Mortmain and Charitable Uses Act, 1888,¹ enacts that all conveyances to charitable uses shall be void, unless, among other formalities,² they be enrolled in the Central Office of the Supreme Court of Judicature,³ "within six calendar months next after the making of the assurance of the land."⁴ This enactment, however, does not apply to any conveyance or assurance of lands, &c., to or in trust for the overseers of the poor, or the guardians of any parish or union, for the purpose of providing a workhouse or asylum for the accommodation of the poor.⁵ Another important Act rendering enrolment necessary is the Clerical Disabilities Act, 1870,⁶ which contains some special provisions for enrolling deeds of relinquishment executed by parsons.⁷

§ 1120. An old Act⁸ requires every bargain and sale passing an estate of inheritance, or freehold in any lands, tenements, or hereditaments, by deed, to be enrolled within six months next after its date, either in the Enrolment Department of the Central Office,⁹ or in the county where the land lies, before the *custos rotulorum*, and two justices, and the Clerk of the Peace, or any two of them, the Clerk of the Peace being one.¹⁰

§ 1120A. With the view of preventing frauds upon creditors by the secret transfer of personal property, various Acts also render void¹¹ every warrant of attorney to confess judgment in any personal action, every *cognovit actionem* given by any person, every judge's order made by consent, and given by a defendant in a personal action, authorising the plaintiff to sign judgment, or issue execution,¹² and every bill of sale of personal chattels,¹³—which

¹ 51 & 52 V. c. 42, § 4, subs. 1.

² See ante, § 1110.

³ 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

⁴ As to proof of such enrolment, see post, § 1650.

⁵ 7 & 8 V. c. 101 ("The Poor Law Amendment Act, 1844"), § 73.

⁶ 33 & 34 V. c. 91.

⁷ As to proof of the executing and enrolment of such a deed, see post, § 1653.

⁸ 27 H. 8, c. 16; extended to counties palatine by 5 E. c. 26.

⁹ As to proof of such enrolment, see post, § 1649.

¹⁰ 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

¹¹ See *Acraman v. Herniman*, 1851; *Farrow v. Mayes*, 1852; *Bryan v. Child*, 1850.

¹² 32 & 33 V. c. 62, §§ 26, 27; 3 G. 4, c. 39, §§ 1—3; 6 & 7 V. c. 66. For the corresponding Irish enactments, see 3 & 4 V. c. 105 ("The Debtors (Ireland) Act, 1840"), § 12, Ir.; 20 & 21 V. c. 60, §§ 334, 335, Ir.

¹³ 45 & 46 V. c. 43, § 8. For a somewhat corresponding Irish enactment, see 42 & 43 V. c. 50, § 8, Ir.; and 46 V. c. 7, § 8, Ir.

phrase, it may be noted in passing, will now include fixtures and growing crops when separately assigned or charged,¹—unless within twenty-one days after the security or the consent has been given, in the case of a warrant, cognovit, or judge's order, or within seven days after execution in the case of a bill of sale,² the instrument, or a true copy thereof, be filed, together with an affidavit³ of the time when it was executed or given, in the Bills of Sale Department of the Central Office.⁴

§ 1121. All deeds and instruments, whereby any estates or hereditaments shall be purchased, sold, leased, charged, or exchanged under the authority of any Act relating to the possessions and land revenues of the Crown, must be enrolled, within six months after their several dates, in the office of Land Revenue Records and Enrolments.⁵ Similar enactments are contained in the statutes which respectively relate to the possessions of the Duchy of Cornwall,⁶ and to the possessions of Her Majesty in respect of the Duchy of Lancaster;⁷ but the instruments requiring enrolment under these Acts must be enrolled in the offices of the respective duchies.⁸

§ 1122. The Fines and Recoveries Act,⁹ 1833, enacts,¹⁰ that no assurance, by which any disposition of lands shall be effected under that Act by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, shall have any operation by virtue of the Act, unless it be enrolled in what is now called the Enrolment Department of the Central Office¹¹ within six calendar months after its execution; while § 46

¹ 41 & 42 V. c. 31, §§ 4, 5; 42 & 43 V. c. 50, § 4, Ir.; 46 V. c. 7, § 6, Ir. As to the old law so far as it related to growing crops, see *Branton v. Griffiths*, 1877, C. A.

² The registration of every bill of sale must now be renewed every five years, under the authority of 41 & 42 V. c. 31, § 11; 42 & 43 V. c. 50, § 11, Ir.

³ As to what the affidavit must contain, see *Jones v. Harris*, 1871; *Murray v. Mackenzie*, 1875; *Blount v. Harris*, 1879, C. A.; *Castle v. Downton*, 1879, and cases there cited.

⁴ 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1. As to proof of the various matters mentioned in

this section, see post, § 1654.

⁵ 10 G. 4, c. 50, § 63 ("The Crown Lands Act, 1829"); 2 W. 4, c. 1, ("The Crown Lands Act, 1832"), § 21; 14 & 15 V. c. 42 ("The Crown Lands Act, 1851"), § 6.

⁶ 26 & 27 V. c. 49, §§ 30—33; 7 & 8 V. c. 65, §§ 30—36; 11 & 12 V. c. 83, § 6.

⁷ 11 & 12 V. c. 83, § 14.

⁸ As to proof of such enrolments, see post, § 1648.

⁹ 3 & 4 W. 4, c. 74.

¹⁰ § 41.

¹¹ See 42 & 43 V. c. 78, § 5; R. S. C. 1883, Ord. LXI. r. 1.

provides, that the consent of a protector to the disposition of a tenant in tail shall, if given by a distinct deed, be void, unless the deed be enrolled either at or before the time when the assurance by the tenant in tail shall be enrolled.¹

§ 1125. A clause in the Judgments Act² of 1855 enacts, in substance, that no annuity or rent-charge, otherwise than by marriage settlement,³ for life or lives, or for any term or estate determinable on life or lives, shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless a memorandum containing the name, residence, and description of the person whose estate is intended to be affected, and the date of the instrument, and the annual sum payable, be left for registration in the Enrolment Department of the Central Office.⁴ Notwithstanding the language of this enactment, the Court of Appeal has held that an unregistered annuity-deed may still be enforced as against a subsequent incumbrancer or purchaser who may have taken with notice of its existence.⁵

§ 1126. The written contract between the articulated clerk and the solicitor to whom he is bound, must be enrolled with the clerk of the Petty Bag, within six months after its date, together with an affidavit to be made by the solicitor, verifying the fact of the deponent having been duly admitted, and the further fact of the articles having been duly executed.⁶

§ 1127. The principal statutes which *permit*⁷ enrolments to be made, are first, the Yorkshire Registries Act;⁸ secondly, the

¹ See also §§ 49, 51, 52, and 59 of 3 & 4 W. 4, c. 74, for further provisions respecting enrolment. As to proof of such enrolment, see post, § 1650A.

² 18 & 19 V. c. 15, § 12.

³ Annuities and rent-charges given by will are also excluded from the provision. See § 14 of the Act.

⁴ The words of the Act are, "with the senior Master of the Court of Common Pleas." As to how enrolment of annuity deeds is proved, see post, § 1651.

⁵ *Greaves v. Tofield*, 1880, C. A.; *diss. Jessel, M.R., dubitante Bramwell, L.J.*

⁶ 6 & 7 V. c. 73 ("The Solicitors

Act, 1843"), §§ 8, 20; 29 & 30 V. c. 84, § 12, *Ir.*, and rule "as to custody of rolls and documents." As to proof of such enrolment, see post, § 1653A.

⁷ See *Agra Bk. v. Barry*, 1874, H. L.; and *In re Lambert's Estate*, 1884 (*Ir.*), C. A., as to the prejudicial results which may occur by omitting to register an instrument capable of registration in a registry county.

⁸ 47 & 48 V. c. 54; see especially § 51; and see also notes, post, to §§ 1645, 1648, 1654, and 1840. As to proof of the enrolment, see § 1652A. Under the former Acts, for which this Act is now substituted, where there was a contest as to priority between

Act¹ applicable to the registration of lands in Middlesex; thirdly, the Act which governs the registration of deeds, &c., in Ireland;² fourthly, the Charitable Trusts Act, 1855, allowing enrolments of any deed, will, or document relating to any charity, in the office of the Charity Commissioners, and subsequent proof thereof by copies certified under the hand of the secretary or one of the Commissioners;³ and fifthly, the Act⁴ remedying defective titles to certain inclosures,—after reciting that by divers Acts of Inclosure the awards of the Commissioners were required to be enrolled, but that such enrolments have in many instances been omitted,—enacts, that the awards not enrolled shall still be valid, but that the parties interested may enrol them if they think proper.⁵

a registered and unregistered mortgage, even though they were not under seal, and therefore only equitable charges, a registered charge had the priority over an unregistered one: In re Wight's Mortgage Trust, 1873; a further charge in favour of even a first mortgagee of land in the registry county requires registration. And see, also, Chadwick v. Turner, 1866, and Credland v. Potter, 1874.

¹ Viz., 7 A. c. 20 ("The Middlesex Registry Act, 1708"), amended by "The Land Registry (Middlesex Deeds) Act, 1891" (54 & 55 V. c. 10), by which the duties of the Middlesex Registry have been transferred to the Land Registry. An instrument

charging lands in Middlesex, though it be not a deed, ought to be registered: Neve v. Pennell, 1863 (Wood, V.-C.); Moore v. Culverhouse, 1860. See last note; and as to proof of enrolment, post, § 1652B.

² 6 A. c. 2, Ir., on the construction of which see Carlisle v. Whaley, 1867, H. L.; and see as to Irish judgments as to mortgages, post, § 1652.


³ 18 & 19 V. c. 124, § 42. As to proof of the enrolment, see post, § 1650.

⁴ 3 & 4 W. 4, c. 87, §§ 1 and 2.

⁵ As to proof of the enrolment, see post, §§ 1646 and 1647.

AMERICAN NOTES.

Statutory Writings. — The statute requirements of the different states of the American Union as to the necessity of written evidence in certain cases, though presenting a certain similarity do not apparently admit of useful classification within the compass of an annotation. It is essential, however, that these statutory rules be not confused with the "Parol Evidence Rule" to be considered in the following chapter. It is quite frequently said that "parol evidence is not admissible" to prove certain facts, as if under the application of the "Parol evidence Rule" when, in point of fact, it is the Statute of Frauds or the Statute of Wills which causes the exclusion.



CHAPTER IV.

ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

§ 1128. THE *admissibility of extrinsic parol testimony to affect written instruments* is, perhaps, the most difficult branch of the law of evidence. In discussing the law as to this, one or two established principles, which govern the interpretation of all writings, may be mentioned. First, parol evidence is admissible to show under what surrounding *circumstances* an instrument was executed;¹ next, in order to put a just construction upon any document, the court must *read the whole* of it, and determine the meaning of the words employed in any passage, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument.² The language of a particular passage may clearly bear a wider or narrower signification, when read in connexion with other parts of the instrument where the same language is employed, than it would have borne had no such reflected light been thrown upon it. As Lord Cairns forcibly put it, the writer of the instrument has often himself “made us a dictionary” by which to read it.³ For instance, suppose a question respecting the meaning of the word “close,” as used in a will. If this expression only occurs once, evidence is admissible to show that, in the county where the property is situate, it denotes a farm: if, however, the word be found in other parts of the will, in any one of which this enlarged meaning cannot be applied to it, such evidence will be rejected, as the court can see that the testator used the word in its ordinary

¹ *Grahame v. Grahame*, 1887 (Ir.), post, § 1194.

² *Blundell v. Gladstone*, 1841; *Bateman v. Ld. Roden*, 1844 (Ir.) (Sugden, C.).

³ *Hill v. Crook*, 1873, H. L.; adopted by Jeune, Pres.; in the goods of Ashton, 1892. And see *Grant v. Grant*, 1869; § 1195.

sense, as denoting an enclosure.¹ Similar principles have been applied to interpret the words “nephews and nieces;”² “relatives” or “cousins.”³ Similarly, the context may show the word “month,” which usually in law denotes a lunar month, to mean a calendar month.⁴ In like manner, when ambiguous words are used in the operative part of a deed, the recitals and other parts of the instrument furnish an excellent test for discovering the real intention and fixing their true meaning.⁵

§ 1129. Again, on a question whether a legacy, given by a codicil to a legatee under the will, is cumulative or substitutionary, the court may look, not only to other parts of the same codicil, but to bequests in other later testamentary instruments. If, for instance, it should appear that, in these later codicils, the testator had used the words “in addition,” when making bequests to other parties which were intended to be cumulative, the absence of these words, or of equivalent expressions, in the legacy in question, would be a circumstance far short, indeed, of conclusive, but tending to show, in connexion with other facts and arguments, that the later legacy was intended not to be additional but in substitution. The court, in such case, would carry back and apply to the first codicil the knowledge acquired by examining the language of the later bequests.⁶

§ 1130.⁷ If an instrument consist partly of a printed formula, and partly of written words, and any reasonable doubt is felt⁸ as to the meaning of the whole, *written words have greater effect* in the interpretation than those which are printed.⁹ The written words are the immediate language selected by the parties themselves for the expression of their meaning; but the *printed formula* is simply general, applying not only to the particular case, but to that of all other similar contracts.¹⁰

¹ Richardson v. Watson, 1833 (Parke, J.).

² Grant v. Grant, 1869, supra.

³ Seale-Hayne v. Jodrell, 1891, H. L.; Re Blower's Trusts, 1871; In the goods of Ashton, 1892.

⁴ Lang v. Gale, 1813; R. v. Chawton, 1841. See ante, § 16.

⁵ Walsh v. Trevanion, 1850; Palikelagatha Marcar v. Sigg, 1880, P. C.

⁶ Lee v. Pain, 1844 (Wigram, V.-C.); Russell v. Dickson, 1842 (Sugden, C.); Darley v. Martin, 1853.

⁷ Gr. Ev. § 278, almost verbatim.

⁸ But not otherwise. See The Nifa, 1892; Scrutton v. Childs, 1877.

⁹ This rule is embodied in the N. York Civ. Code, § 1695.

¹⁰ Robertson v. French, 1803 (Id.

§ 1131. Next, the terms of every document must, in the absence of all parol testimony, be construed in their *primary* sense, unless the context evidently points out that they need, in the particular instance, in order to effectuate the immediate intention of the parties, to be understood in some other and peculiar sense.¹ The question, what is the primary sense of a word? is often more easily asked than answered.² Generally, if the language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning;³ but expressions having reference to the common transactions of life will be interpreted according to their plain, ordinary, and popular meaning.⁴ Evidence that expressions

Ellenborough); *Gumm v. Tyrie*, 1864 (Crompton and Blackburn, J.J.). See *Jessel v. Bath*, 1867. In America it has, with apparent inconsistency, been held that if a letter refer to a verbal contract, the terms of such verbal contract may be shown, even though they are inconsistent with the letter (*Holt v. Pie*, 1888 (Am.)); but that if a contract refer to a plan which is inconsistent with it, the contract itself will prevail: *Smith v. Flanders*, 1880 (Am.).

¹ *Robertson v. French*, 1803 (Ld. Ellenborough); *Mallan v. May*, 1844 (Pollock, C.B.); *Carr v. Montefiore*, 1864; *Ford v. Ford*, 1848 (Wigram, V.-C.); *Hicks v. Sallitt*, 1854 (Wood, V.-C.); *Boorman v. Johnston*, 1834 (Am.). See, also, *Rhodes v. Rhodes*, 1882, P. C.; *Gray v. Pearson*, 1851, H. L. (Ld. Wensleydale); *Abbott v. Middleton*, 1858, H. L. (id.); *Slingsby v. Grainger*, 1859, H. L. (id.); *Wing v. Angrave*, 1860, H. L. (id.); *Gordon v. Gordon*, 1871, H. L.; *Ex parte Walton*, re Levy, 1881 (Jessel, M.R.). See *Bathurst v. Errington*, 1877, H. L.; *Holt v. Collyer*, 1881. Accordingly, evidence that the parties only meant that it had not lapsed by non-payment of certain patent fees is not admissible to qualify a covenant that a patent "is in full force and effect": *Chemical Electric Light, &c. Co. v. Howard*, 1890 (Am.). And where a contract is for "half" of certain property, it cannot be shown by parol evidence that the parties

really meant less than half: *Butler v. Gale*, 1855 (Am.). If it be doubtful whether a word is used in its ordinary sense or not, it is for a jury to say how this is: *Simpson v. Margetson*, 1847.

² See *Doe v. Perratt*, 1843, where the judges differed whether the word "heir" in a will was to be construed in its technical or popular sense. See, also, *Wells v. Wells*, 1874, where *Jessel, M.R.*, held, in opposition to some authorities, that "nephew" meant blood nephew, and did not include the son of a husband's sister. See, also, *Merrill v. Morton*, 1881 (Malins, V.-C.), and cases cited *supra*, § 1128.

³ *Shore v. Wilson*, 1842, H. L. (Coleridge, J.); *Doe v. Perratt*, 1843 (Parke, B.).

⁴ *Robertson v. French*, 1803 (Ld. Ellenborough); *Shore v. Wilson*, 1842, H. L. (Tindal, C.J.). The rules for the interpretation of wills laid down in *Wigram* may be safely applied, *mutato nomine*, to all other private instruments, and are, as the result both of principle and authority, expressed in the following seven propositions:—"I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense

were used in a technical sense ought not to be admitted without a distinct averment as to the particular words to which such evidence is proposed to be directed, and as to the precise technical or trade meaning which it is sought to attribute to them.¹

§ 1132. Bearing the above principles in mind, the leading general rule respecting the admissibility of extrinsic evidence to

in which they are to be construed.

II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable. IV. Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact re-

lating to the person who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of *intention*, to make certain the *person or thing* intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i. e. *person or thing* intended) is described in terms, which are applicable indifferently to more than one *person or thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator": Wigr. Wills, 10—13.

¹ Sutton v. Ciceri, 1890, H. L. (Ld Watson).

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affect what is in writing is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument.*¹ This common law rule may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Ld. Coke calls "the uncertain testimony of slippery memory."² When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract,³ it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong.⁴

§ 1133. Apart from all considerations of convenience, positive enactment has imposed the same rule⁵ in several cases. It has, by requiring certain transactions to be evidenced by writing,—as, for instance, wills, contracts within the Statute of Frauds, and the like,⁶—rigidly excluded all parol testimony tending to vary the terms contained in the written instrument.⁷ The statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in

¹ *Goss v. Ld. Nugent*, 1833; *Wigr. Wills*, 5; 2 *Ph. Ev.* 339. So, by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses": *Tait Ev. (Sc.)* 326, 327; 1 *Dickson, Ev.* 92, et seq., 118; *Inglis v. Buttery*, 1878, *H. L. (Sc.)*. See American authorities collected in note to § 275 of 15th edit. (1892) of *Greenleaf on Evidence*, at pp. 372-3. The rule applies to all records of judgments or official proceedings. See *Id.*

² *Lady Rutland's case*, 1604-5.

³ See *Johnson v. Appleby*, 1874.

⁴ *Preston v. Merceau*, 1775; *Rich v. Jackson*, 1794 (*Ld. Thurlow*); *Adams v. Wordley*, 1836; *Parteniche v. Powlet*, 1742 (*Ld. Hardwicke*); *Bogert v. Cauman*, 1807-51 (*Am.*); *Bayard v. Malcolm*, 1806 (*Am.*) (*Kent, C.J.*).

⁵ That set out in § 1132.

⁶ See ante, § 986 et seq.

⁷ *Wigr. Wills*, 4, 6—8, 125, 126.

any degree, is to the like extent to repeal the particular Act which renders the writing necessary.¹ The term, "written instrument," for this purpose, includes not only records, deeds, wills, and other instruments required by statute or common law to be in writing, but every document which contains the terms of a *contract* between different parties, and is designed to be the repository and evidence of their final intentions.²

§ 1134. To less formal documents than those above-named, the rule³ does not extend. Therefore, except in some few special cases,⁴ a receipt, so far as it is a mere *admission*,⁵ is not conclusive evidence of the payment therein acknowledged, but the party signing it may invalidate it by oral evidence of fraud, or of mistake or surprise on his part; for the document amounts only to *primâ facie* proof, and is capable of being explained;⁶ an order for goods, insufficient to satisfy the Statute of Frauds, or a loose memorandum, not intended to contain the terms of the contract, will not exclude parol evidence on the subject—so that where a defendant, having ordered goods by an unsigned letter, not mentioning any time for payment, and therefore not in itself sufficient to satisfy the Statute of Frauds, afterwards accepted the goods which the plaintiff forwarded to him with the invoice, in an action for their price, parol evidence was admitted to show that the goods were really supplied on a credit, which had not expired at the commencement of the suit;⁷ in an action for breach of warranty, where plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and the defendant, shortly after the purchase was com-

¹ Wigr. Wills, 4, 6—8, 125, 126; *Miller v. Travers* (1832); *Doe v. Hiscocks*, 1839; *Clayton v. Ld. Nugent*, 1844 (*Alderson and Rolfe*, BB.).

² *Woolam v. Hearn*, 1802 (*Sir W. Grant*); *Shore v. Wilson*, 1842 (*Williams, J.*); *Stackpole v. Arnold*, 1814 (*Parker, J.*); *Hunt v. Adams*, 1809 (*Am.*) (*Sewell, J.*).

³ Set out, *supra*, § 1132.

⁴ See ante, §§ 96, 845.

⁵ But perhaps so far as (e.g., in a bill of lading) it is evidence of a *contract*, it cannot be contradicted. See *Stratton v. Rastall*, 1788; *Almer v. George*, 1808: and American

authorities collected in *Greenleaf on Ev.* (15th edit.), § 305, p. 420.

⁶ *Farrar v. Hutchinson*, 1839 (*Am.*); *Skaife v. Jackson*, 1824; *Lee v. Lanc. and Yorks. Rail. Co.*, 1871, C. A.; *Wallace v. Kelsall*, 1840; *Fuller v. Crittenden*, 1832 (*Am.*); à fortiori other modes of payment may be shown, although the bill-head of the account rendered says: "All bills to be paid to — and receipted by him": *Kershaw v. Kershaw*, 1875 (*Am.*).

⁷ *Lockett v. Nicklin*, 1848. See § 1151, post

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pleted, gave him a paper in the following form :—" Bought of A. B., a horse for 7*l.*—A. B.,"—the plaintiff was allowed to prove the warranty by parol evidence, the paper appearing to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not to contain the terms of the contract itself;¹ where the hirer of a horse had, at the time of hiring, handed the owner a card, on which was written in pencil, "six weeks at two guineas, W. H.," the owner was permitted to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term, namely, that all accidents occasioned by the shying of the horse should be at the hirer's risk;² and on a sale of a chattel under the value of 10*l.*, an auctioneer is not bound by the description of the article contained in an unsigned printed catalogue, but he may show that when the article was put up to auction he publicly stated in the purchaser's hearing that the description was incorrect.³

§ 1135. The rule⁴ does not moreover prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some *collateral* matter.⁵ Still less, indeed, does the rule, as will

¹ Allen v. Pink, 1838.

² Jeffery v. Walton, 1816. For other instances, see ante, § 406.

³ Eden v. Blake, 1845. As to examinations of prisoners, see ante, §§ 893, 894.

⁴ Set out in § 1132.

⁵ Lindley v. Lacey, 1864; Morgan v. Griffith, 1871. See post, § 1147; also Brady v. Oastler, 1864; Malpas v. Lond. & S. W. Rail. Co., 1866. An oral stipulation that an instrument is not to become binding unless and until some stipulation be first fulfilled may always be shown. See Lindley v. Lacey, 1864; Wallis v. Littell, 1861; Morgan v. Griffith, 1871. Where an instrument is not formal it may often be shown that some additional and supplementary agreement was made contemporaneously with the principal one. See supra, § 1134; and Greenleaf on Ev. 15th edit. (1892), § 304 and notes. Thus, in America, even a promissory

note has been held not to be such a formal instrument as to prevent its being shown that at the time of its execution there was an agreement to pay "extra interest" beyond that named in it: Rohan v. Hanson, 1853 (Am.) When an instrument is a formal one it is often extremely difficult to say what is really "collateral" to it. Obviously, unless some restriction be imposed, the rule that parol evidence is not admissible to vary, &c. a written contract may be rendered altogether nugatory. It has been suggested in America that a matter ought not to be considered "collateral" to a formal instrument except where it is evident from the writing itself that such writing contains *part only*, and not the whole, of the agreement. See Greenleaf on Ev. 15th edit. (1892), § 284, and note thereto, at p. 384; see, also, *ibid.* § 89. It is further submitted that, at any rate, evidence of a collateral

presently be shown,¹ exclude evidence of an oral agreement, which constitutes a condition which shows its real nature,² or the existence of a condition upon which its performance is to depend.³ Again, the rule is not infringed by the admission (under proper pleading) of parol evidence, showing that the instrument is altogether *void*, or *never* had any *legal* existence or binding force, either by reason of forgery or fraud, or of the illegality of the subject-matter, or for want of due execution and delivery.⁴ For instance, it may be shown by parol evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow,⁵ or that a document was really meant to be conditional on the happening of an event which had never occurred.⁶ *Fraud* by the party relying upon the agreement, practised upon the other party in that which is the subject-matter of the claim, is, moreover, universally fatal to the claim. "The covin," says *Ld. Coke*, "doth suffocate the right."

§ 1136. This is so, whether the foundation of the claim be a record,⁷ a deed, or a writing without seal; for in either case the instrument will be void—or, more correctly, *voidable* at the option of the injured party,⁸—if obtained by fraud, and the fraud may be established by parol evidence.⁹ Thus, if a person has been induced by verbal fraudulent statements to enter into a written contract for a purchase, he may, in an action for a deceitful representation,

supplementary contract to a formal contract ought not to be admitted save where it is alleged to have been made at such a time that it could not possibly have been incorporated in the written contract. In any case, an order which is plainly a separate and distinct one from the subject-matter of the original contract is "collateral." See *Reid v. Battie*, 1829; and cases cited, post, § 1147.

¹ *Infra*, in this §, and note thereto.

² E.g., that a bill or mortgage was only to stand as security for certain moneys, or otherwise to show the real nature of a transaction; see *Trench v. Doran*, 1887 (Ir.).

³ *Lindley v. Lacey*, 1864 (Byles, J.).

⁴ *Gun v. McCarthy*, 1884 (Ir.); *Collins v. Blantern*, 1766-7; and cases cited in the notes to *S.C.* in 1 *Smith, L. C.*; *Paxton v. Popham*, 1808 (Ld.

Ellenborough).

⁵ *Murray v. Ld. Stair*, 1823.

⁶ *Pym v. Campbell*, 1856; *Davis v. Jones*, 1856. See, also, *Wallis v. Littell*, 1861; *Rogers v. Hadley*, 1863; *Gudgen v. Besset*, 1856. The same doctrine applies to wills, though it must be used with very great caution: *Lister v. Smith*, 1863.

⁷ See post, § 1713.

⁸ *Urquhart v. Macpherson*, 1878, P. C.; *Clarke v. Dickson*, 1858.

⁹ *Tait*, Ev. 327, 328; *Buckler v. Millerd*, 1689; *Filmer v. Gott*, 1774; *Robinson v. Ld. Vernon*, 1859; *Rogers v. Hadley*, 1863; *Taylor v. Weld*, 1809 (Am.) (Sedgwick, J.); *Franchot v. Leach*, 1826 (Am.); *Dorr v. Munsell*, 1816 (Am.); *Morton v. Chandler*, 1831 (Am.); *Com. v. Bul-lard*, 1812 (Am.).

prove the fraud by evidence aliundè, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer.¹ Again, the fraudulent representation of a vendor respecting the article sold, may be given in evidence, if the purchaser has thereby been prevented from discovering a fault which the vendor knew to exist.² Moreover, the declarations of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery;³ and similar evidence will be received with the view of rebutting the presumption, that an alteration, or interlineation, apparent on the face of the will, was made after its execution.⁴ For this last purpose, however, the declarations of the testator must have been made before the writing was executed, though it matters not whether the instrument be, or be not, a holograph will.⁵

§ 1137.⁶ Parol evidence may also (under a proper pleading) be given to show that the contract in writing not disclosing these was really made for objects forbidden, either by statute, or by common law;⁷ that such writing was obtained by improper means, such as duress;⁸ that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture,⁹ idiocy, insanity, or intoxication;¹⁰ or that the instrument came into the hands of

¹ *Dobell v. Stephens*, 1825; *Wright v. Crookes*, 1840; *Hotson v. Browne*, 1860.

² *Kain v. Old*, 1824 (*Abbott, C.J.*).

³ *Doe v. Hardy*, 1836; *Doe v. Allen*, 1799.

⁴ *Doe v. Palmer*, 1851; *In re Duffy*, 1871 (*Ir.*); *Dench v. Dench*, 1877.

⁵ *Id.* See *In re Hardy*, 1861; *Staines v. Stewart*, 1862; *In re Ripley*, 1858; *Johnson v. Lyford*, 1868.

⁶ *Gr. Ev.* § 284, in part.

⁷ *Collins v. Blantern*, 1766-7; *Benyon v. Nettlefold*, 1850. See, also, *Biggs v. Lawrence*, 1789; *Waymell v. Reed*, 1794; *Doe v. Ford*, 1835; *Sinclair v. Stevenson*, 1824; *Norman v. Cole*, 1800.

⁸ 2 *Inst.* 482, 483; *B. N. P.* 172; 5 *Com. Dig.*, *Plead.* 2, *W.* 18-23. It is difficult to say how far it is

competent to show that a written contract, apparently complete, never really became a binding one, because it was not intended by the parties to be so until a condition precedent, which is only shown by oral evidence, had been fulfilled, which has in fact never been completed, or that the signature to it was induced by a contemporaneous oral promise to this effect. In America, the result of the decisions appears to be that such evidence is admissible in cases where the witnesses are credible, distinctly remember the facts, and narrate the details exactly. See *Greenleaf on Ev.* 15th edit. (1892), § 284, and notes thereto, pp. 381-2. See also ante, note to § 1135.

⁹ 2 *Inst.* 482, 483; *B. N. P.* 172; 5 *Com. Dig.*, *Plead.* 2, *W.* 18-23.

¹⁰ *B. N. P.* 172; *Barrett v. Buxton*, 1826 (*Am.*) (*Prentiss, J.*).

the plaintiff without any absolute and final delivery by the obligor or party charged.¹

§ 1138. Parol evidence may also be given to show a want or failure of consideration, in the absence of which even an agreement, which is merely in writing, is not binding.² When, however, an instrument is under seal the seal is, in the absence of fraud, conclusive evidence of a sufficient consideration,³ and is strong presumptive evidence that the consideration stated is the true consideration.⁴ If no consideration, or a mere nominal consideration, be stated in a deed, the party will be allowed to prove a real substantial consideration by extrinsic evidence;⁵ and if such deed is expressed to be made "for divers good considerations," it may be averred and proved by parol that the bargainee gave money for his bargain.⁶ The onus, however, of proving the consideration will, in such a case, lie on the party claiming under the deed; for the mere statement in the instrument that it was made for valuable consideration will not suffice to raise a presumption that any substantial consideration was, in fact, given.⁷ When, moreover, an instrument *under seal* specifies any particular consideration, such as love and affection, omitting all mention of any other, in general no extrinsic proof of another can be given, because it would contradict the deed.⁸ This rule, however, never applies at all to instruments merely written.⁹ And it does not even apply to instruments under seal where the object is to establish or negative the existence of fraud.¹⁰

§ 1139. Parol evidence will sometimes be admitted upon equitable grounds, to contradict or vary a writing, which, by some *mistake in fact*,¹¹ speaks a different language from what the parties

¹ B. N. P. 172; *Clark v. Gifford*, 1833 (Am.); *U. S. v. Leffler*, 1837 (Am.).

² *Foster v. Jolly*, 1835; *Solly v. Hinde*, 1834; *Abbott v. Hendricks*, 1840; ante, § 1023.

³ Ante, § 86.

⁴ *Barton v. Bank of New South Wales*, 1891, P. C.

⁵ *Leitchchild's case*, 1865 (Kindersley, V.-C.); *Peacock v. Monk*, 1748.

⁶ 2 Ph. Ev. 347; *Tull v. Parlett*, 1829 (Tindal, C.J.).

⁷ *Kelson v. Kelson*, 1853 (Wood, V.-C.).

⁸ *Peacock v. Monk*, 1748 (Ld. Hardwicke); cited by Alderson, B., in *Gale v. Williamson*, 1841. But see *Clifford v. Turrell*, 1841.

⁹ *In re Barnstaple Second Anniversary Society*, 1884.

¹⁰ *Filmer v. Gott*, 1774; cited by Ld. Kenyon in *R. v. Scammonden*, 1789; *Gale v. Williamson*, 1841; *Pott v. Todhunter*, 1845. See 13 E. c. 5.

¹¹ See *Hunt v. Rousmanier*, 1823 (Am.); *Price v. Ley*, 1863.

intended, and it would consequently be unjust to enforce it according to its expressed terms. In all such cases, however, the party seeking relief undertakes a task of great difficulty, since the court must be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected.¹ A *plaintiff* may seek this relief either by commencing an action to *reform* the writing, in which it will be necessary (except under very special circumstances²) to satisfy the court that the mistake was made on *both* sides³—or one to *rescind* the instrument,—in which conclusive proof of error or surprise on the plaintiff's part alone will suffice,⁴ but it must appear that the mistake was one of vital importance.⁵ Whichever form of relief be sought, if the defendant deny the case set up by the plaintiff, and the latter simply relies on verbal testimony, and has no documentary evidence,—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like,—the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed.⁶

§ 1140. A *defendant*, against whom a specific performance of a written agreement is sought, may also insist upon the existence of a mistake in the writing, and establish this by parol, relying on any matter showing it to be inequitable to enforce the contract.⁷

¹ *M. of Townsend v. Strangroom*, 1801; *Mortimer v. Shortall*, 1842 (Sugden, C.); *Bold v. Hutchinson*, 1855; *Wright v. Goff*, 1856; *Ashhurst v. Mill*, 1848; *Gillespie v. Moon*, 1817 (Am.); *M'Cormack v. M'Cormack*, 1876 (Ir.); *Welman v. Welman*, 1880 (Malins, V.-C.).

² *Lovesy v. Smith*, 1880 (Denman, J.).

³ *Mortimer v. Shortall*, 1842 (Ir.) (Sugden, C.); *Murray v. Parker*, 1854; *Rooke v. Ld. Kensington*, 1856; *Bentley v. Mackay*, 1862; *Sells v. Sells*, 1860; *Fowler v. Fowler*, 1859; *Elwes v. Elwes*, 1861; *Bradford v. Romney*, 1862; *Gray v. Boswell*, 1862 (Ir.); *Fallon v. Robins*, 1865 (Ir.). See *Bloomer v. Spittle*, 1872 (Ld. Romilly, M.R.).

⁴ *Mortimer v. Shortall*, 1842 (Ir.) (Sugden, C.); *Murray v. Parker*, 1854; *Rooke v. Ld. Kensington*, 1856; *Bentley v. Mackay*, 1862; *Sells v. Sells*, 1860; *Fowler v. Fowler*, 1859; *Elwes v. Elwes*, 1861; *Bradford v. Romney*, 1862; *Gray v. Boswell*, 1862 (Ir.); *Fallon v. Robins*, 1865. See *Harris v. Pepperell*, 1867.

⁵ 1 Story, Eq. Jur. § 144, n.

⁶ *Mortimer v. Shortall*, 1842 (Ir.) (Sugden, C.); *Alexander v. Crosbie*, 1835; *M. of Townsend v. Strangroom*, 1801; *Gillespie v. Moon*, 1817 (Am.) (Kent, C.); *Lovesy v. Smith*, 1880 (Denman, J.).

⁷ 1 Story, Eq. Jur. § 161; 2 id. § 770; *M. of Townsend v. Strangroom*, 1801; *Davies v. Fitton*, 1842 (Ir.) (Sugden, C.); *Wood v. Scarth*,

But here the following artificial distinction is recognised in British courts: parol evidence may be received *against* a plaintiff seeking a specific performance, but it will be inadmissible in his *favour*. In other words, the courts will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution.¹ In America, Chancellor Kent has rejected this distinction;² and Story, J., takes the same view, observing that there is no mutuality or equality in the operation of such a doctrine.³

§ 1141.⁴ Moreover, the rule against varying or contradicting a written document by parol evidence⁵ does not exclude verbal evidence adduced to prove that the written agreement has been *totally* waived or discharged. An agreement by *deed* can, indeed, only be entirely, or even partially, dissolved by an instrument of an equally solemn character; the maxim of law being that unumquodque ligamen dissolvitur eodem ligamine quo et ligatur.⁶ Thus to an action on a covenant for payment of money, a parol discharge, without a deed, in satisfaction of all demands is no available defence;⁷ and an action by a landlord against his tenant on the latter's covenant to yield up, at the expiration of the term, all erections set up during the tenancy, is not answered by proof of a subsequent agreement (not by deed), that if defendant built a greenhouse on the premises, he should be at liberty to re-

1855; *Webster v. Cecil*, 1861; *Manser v. Back*, 1848 (Wigram, V.-C.); *Howard v. Wright*, 1823 (Leach, V.-C.); *Squire v. Campbell*, 1836 (Ld. Cottenham). See *Carpenter v. Providence Washington Ins. Co.* 1846 (Am.).

¹ *Davies v. Fitton*, 1842 (Ir.) (Sugden, C.); *M. of Townsend v. Strangroom*, 1801; *Woollam v. Hearne*, 1802; *Higginson v. Clowes*, 1808; *Clowes v. Higginson*, 1813; *Rich v. Jackson*, 1794; *Clinan v. Cooke*, 1802 (Ir.); *Att.-Gen. v. Sitwell*, 1835; *Squire v. Campbell*, 1836 (Ld. Cottenham). See, however, *McCormack v. McCormack*, 1876 (Ir.); *Gun v. McCarthy*, 1884 (Ir.) (Flanagan, J.).

² *Keisselbrack v. Livingstone*, 1819 (Am.).

³ 1 Story, Eq. Jur. § 161, and n. Those who require further information on this subject are referred to 1 Sug. V. & P. (10th edit.) 222—233, 258—266; 1 Story, Eq. Jur. §§ 152—161; Gresl. Ev. 205—209.

⁴ Gr. Ev. § 302, in part, as to first five lines.

⁵ Set out in § 1132.

⁶ 2 Inst. 360; Wing. Max. 68—72; Story, Agen. § 49; *Fowell v. Forrest*, 1669—70; *Harris v. Goodwyn*, 1841; *Doe v. Gladwin*, 1845; *Rawlinson v. Clarke*, 1845.

⁷ *Rogers v. Payne*, 1768, recognised in *West v. Blakeway*, 1841; *Cordwint v. Hunt*, 1818. See *Spence v. Healey*, 1853; *May. of Berwick v. Oswald*, 1853; *The Thames Iron Works Co. v. The Roy. Mail St. Packet Co.*, 1862.

C. IV.] WAIVER OR DISCHARGE OF AGREEMENT BY PAROL.

move it.¹ Formerly, indeed, an agreement in discharge of a deed was equally inadmissible whether it was in writing or merely verbal, or whether it was executory or executed; so that if an act was required by deed to be done within a certain time, evidence could not be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended.² Perhaps, however, now, in this latter event, the courts would grant relief on equitable grounds;³ at least, if it could be shown that the license to extend the time was founded on some good consideration.⁴

§ 1142. The doctrine just stated has, however, nothing to do with the general rule that a written document cannot be contradicted or varied by parol evidence.⁵ It rests entirely on the solemn nature of deeds. Consequently, in the case of agreements not under seal, to adopt the language of Lord Denman,⁶ in the *absence of statutory interference*: "After an agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement."

§ 1143. Where, indeed, writing is by statute made necessary to the validity of an agreement, the rule is different. The better opinion is, however, that contracts concerning the sale of land or goods, which fall within the 4th section of the Statute of Frauds, or § 4 of The Sale of Goods Act, 1893,⁷ may be *wholly waived* or

¹ *West v. Blakeway*, 1841. But see *Cort v. Ambergate, &c. Rail. Co.*, 1851.

² *Gwynne v. Davy*, 1840 (Tindal, C.J.); *Littler v. Holland*, 1790. See *Nash v. Armstrong*, 1861. See, also, *Williams v. Stern*, 1879, C. A., questioning *Albert v. The Grosvenor Invest. Co.*, 1867.

³ *Gwynne v. Davy*, 1840 (Tindal, C.J.).

⁴ See *Williams v. Stern*, 1879, C. A.

⁵ Set out in § 1132.

⁶ In *Goss v. Nugent*, 1833. By Scotch law no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. *Tait, Ev.* 325 (S.). Neither can a written agreement be afterwards waived or varied by mere words; though a subsequent parol agreement, accompanied or followed by part performance, will suffice for that purpose: *Bargaddie Coal Co. v. Wark*, 1859, H. L.

⁷ 56 & 57 V. c. 71.

abandoned by a subsequent oral agreement, so as to prevent either party from recovering on the original written contract; for the Act, without distinctly stating that the contracts in question must be in writing, merely says that, unless they are so, no action shall be brought upon them.¹

§ 1143A. The result is that no general rule can safely be laid down as to the validity of the oral dissolution of a statutory instrument; but in each case, the special language of the Act requiring the writing must be duly considered; while in several cases (as, for instance, in that of a will) it is clear that a verbal abandonment will not suffice.²

§ 1144. But, whatever may be the effect of an oral dissolution of the *whole* of a statutory contract, *no verbal agreement to abandon it in part, or to add to, or modify, its terms, can be received*. To allow such contracts to be proved partly by writing, and partly by oral testimony, would let in all the mischiefs which it was the object of the Legislature to exclude; consequently, it matters not what term of the written contract is sought to be varied by parol, and no distinction can be drawn between the material and immaterial parts of the contract; but everything which originally formed part of the agreement must be deemed to be material.³

§ 1145. Accordingly, if a written contract for the sale, either of goods above the value of 10*l.*, or of lands, state a time for the delivery of the goods, or for the completion of the purchase, no verbal agreement to substitute another day for the one originally agreed upon will be valid,⁴ but the original contract may still be enforced in its entirety;⁵ a vendor who has contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, is not at liberty to show a verbal waiver by the pur-

¹ *Goss v. Ld. Nugent*, 1833 (Ld. Denman); *Price v. Dyer*, 1810 (Sir W. Grant). These dicta go far towards overruling Lord Hardwicke's contrary opinion in *Buckhouse v. Crossby*, 1737; and in *Bell v. Howard*, 1741.

² Ante, § 1063.

³ *Marshall v. Lynn*, 1840 (Parke, B.); *Emmet v. Dewhurst*, 1852; *Moore v. Campbell*, 1854; *Sanderson v. Graves*, 1875.

⁴ *Stowell v. Robinson*, 1837; *Marshall v. Lynn*, 1840; *Stead v. Dawber*, 1839; *Tyers v. Rosedale and Ferryhill Iron Co.*, 1875. These cases overrule *Cuff v. Penn*, 1813; *Warren v. Stagg*, 1787, cited in *Little v. Holland*, 1790; and *Thresh v. Rake*, 1794. See *Ogle v. Ld. Vane*, 1868.

⁵ *Noble v. Ward*, 1867. See, also, *Leather Cloth Co. v. Hieronimus*, 1875; *Hickman v. Haynes*, 1875; *Plevins v. Downing*, 1876.

chaser of his right to a good title as to one lot (since to allow this would be to substitute a partly oral contract for the one which the Statute of Frauds required to be in writing);¹ a contract by a master to pay his clerk a *yearly* salary (which is necessarily in writing, being one not to be performed within a year from its date) cannot be varied by parol evidence to show either a contemporaneous, or a subsequent, verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made;² and where an entire written agreement consists of divers particulars, some of which are within, and others without, the Statute of Frauds, evidence cannot be given of a verbal agreement to vary the latter part even in some trifling particular (as, for instance, to have one valuer instead of two), though that part of the contract might, standing alone, have been good without any writing.³

§ 1146. In applying the doctrine that a written instrument cannot be contradicted or varied by parol *to testamentary instruments*, a distinction must be noted between the revocation of a will, and the ademption, or rather, the payment by anticipation, of a legacy. For, although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy originally contained therein. By "ademption" the law means, that the subject-matter of the legacy has been aliened by the testator in his lifetime.⁴ Thus, where a testator bequeathed 3000*l.* to his daughter for her separate use for life, with remainder to her children, and the residue of his property to his son, in a suit to have the legacy invested and secured, it was held that it might be shown by extrinsic parol evidence that, after the date of the will, the testator had, at his daughter's request, paid her husband 500*l.*, and then declared that this sum was to be considered in part satisfaction of the legacy, expressing a determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so.⁵ The evidence here admitted did not in any way revoke or alter the

¹ Goss v. Ld. Nugent, 1833.

² Giraud v. Richmond, 1846; Evans v. Roe, 1872.

³ Harvey v. Grabham, 1836.

⁴ Harrison v. Jackson, 1877 (Jessel, M.R.).

⁵ Kirk v. Eddowes, 1844 (Wigram, V.-C.); Ferris v. Goodburn, 1858. See Nevin v. Drysdale, 1867.

will, but simply proved a transaction whereby the daughter had in part received her legacy by anticipation; while the testator's declarations, contemporaneously with the advance, were considered as part of that transaction.

§ 1147. The rule excluding parol evidence to vary or contradict a written document,¹ moreover, is not infringed by proof of any *collateral* parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter.² For instance, where parties to a charter-party afterwards agreed by parol to use the ship for a period which was to elapse before the charter-party attached, it was held that this latter contract might be enforced by action.³ The fact of a written demise of an unfinished house having been signed will not preclude the tenant from proving that, subsequently to the agreement for the demise, but at the time when the parties signed it, the landlord verbally agreed with him to put the premises into a habitable state.⁴ Where parties have agreed for the lease of a house to be built upon land at a cost of 400*l.*, a collateral agreement that if their cost exceeded 400*l.*, the rent should be proportionate to the expenditure, is admissible.⁵ Letters which have passed during negotiations which have terminated in a written agreement, are admissible to support a collateral verbal agreement set up by one of the parties;⁶ and if money be received, under circumstances raising an implied promise to pay it to another, or under an express promise so to do, and a deed be subsequently entered into between the parties in order to ascertain the amount to be paid, an action of simple contract can apparently be afterwards, nevertheless, sustained.⁷ If, however, a debt be secured by deed, the claim to payment of it still arises on the deed, even though there has been a subsequent statement of an account respecting it, and the striking of a balance under these circumstances creates no new liability.⁸

§ 1148.⁹ Next, the rule forbidding the variation or contradiction

¹ Set out in § 1132.

² See ante, § 1135.

³ *White v. Parkin*, 1810. See *Seago v. Deane*, 1828; *Fletcher v. Gillespie*, 1826; *Foster v. Allanson*, 1788.

⁴ *Mann v. Nunn*, 1874; *Angell v.*

Duke, 1875.

⁵ *Williams v. Jones*, 1887.

⁶ *Pearson v. Pearson*, 1884, C. A.

⁷ *Edwards v. Bates*, 1844 (*Cresswell, J.*).

⁸ *Middleditch v. Ellis*, 1848.

⁹ *Gr. Ev.* § 283, in part.

of written documents by parol evidence does not restrict the court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, all *contemporaneous writings* relating to the same subject-matter, are admissible in evidence, provided only that they be of equal solemnity with the principal document, *and that no oral testimony be required for the purpose of connecting them therewith.*¹

§ 1149.² The rule excluding parol evidence to vary or contradict written agreements is, moreover, *applied only in suits between the parties* to the instrument, and their representatives. These latter are to blame if the writing contains what was not intended, or omits what it should have contained. But third persons are not prejudiced by things recited in writing, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, or thereby precluded from proving the truth, however contradictory it may be to the written statement.³ Thus, in settlement cases, where the validity of the settlement depended upon the value of an estate, evidence of a greater sum having been paid for such estate than recited in the purchase deed was admissible;⁴ in similar cases, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another;⁵ or to show that, at the time of entering into a contract of service in a particular employment, a verbal agreement was made to pay a sum of money as a premium for teaching the pauper the trade, and that, as this amounted to an apprenticeship, the whole transaction was void for want of a stamp, and no settlement was gained under it;⁶ or to show, where an unstamped assignment of a parish apprentice stated a consideration which would have (if true) made a stamp needful, that the real circumstances were such that the instrument did not require a stamp.⁷

¹ Leeds v. Lancashire, 1809; Hartley v. Wilkinson, 1815; Stone v. Metcalf, 1815; Bowerbank v. Monteiro, 1813 (Gibbs, J.); Gale v. Williamson, 1841; Brown v. Langley, 1842; Peek v. N. Staffords. Rail. Co., 1858; Hunt v. Livermore, 1827 (Am.); Davlin v. Hill, 1834 (Am.); Couch v. Meeker, 1817 (Am.); Lee v. Dick, 1836 (Am.); Bell v. Bruen,

1843 (Am.); ante, § 1026.

² Gr. Ev. § 279, as to first nine lines.

³ R. v. Cheadle, 1832.

⁴ R. v. Scammonden, 1789; R. v. Olney, 1813; R. v. Cheadle, 1832.

⁵ R. v. Wickham, 1835.

⁶ R. v. Laindon, 1799.

⁷ R. v. Llangunnor, 1831.

§ 1150. Some of the cases cited in the last paragraph have been said to have been determined, not only on the ground that the contending parties were strangers to the deeds, but on the principle that, though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument.¹ However this may be, it certainly is also established that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the *recitals* of *formal matter*, for these are not matters of agreement at all, and may well be presumed not to have been stated with careful precision.² Accordingly, parol evidence has, on several occasions, been admitted, to contradict the date which a deed, order, or other instrument purports, or is recited to bear, and to prove that its real date was different.³

§ 1151. Having now pointed out several classes of cases to which the rule rejecting parol evidence in contradiction of a written document⁴ does not extend, we may usefully advert shortly to some of the leading cases in which such rule⁴ has been applied.⁵ Its reason and policy, as well as its nature and extent, will both be best thus seen. For example,⁶ where a policy of insurance was effected on goods “in ship or ships from Surinam to London,” parol evidence is inadmissible to show, that a particular ship, which has been lost, was verbally excepted at the time of the contract;⁷ where a policy or shipping instrument contains express statements, descriptions, or provisions, parol evidence in direct contradiction to them is not admissible;⁸ where an instrument purports to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that payment should be either hastened or postponed,⁹ or that such payment should depend upon

¹ *R. v. Stoke-upon-Trent*, 1843 (Williams, J.); *Sumers v. Moorhouse*, 1884.

² 3 St. Ev. 787, 788; 2 Poth. Obl. 181, 182.

³ *Hall v. Cazenove*, 1804. See *Steele v. Mart*, 1825; *Cooper v. Robinson*, 1842; *R. v. Flintshire*, 1846 (Williams, J.); *Reffell v. Refell*, 1866.

⁴ Set out in § 1132.

⁵ See *Fawkes v. Lamb*, 1862.

⁶ Gr. Ev. § 281, in part.

⁷ *Weston v. Emes*, 1808.

⁸ *Kaines v. Knightly*, 1682; *Leslie v. De la Torre*, 1795.

⁹ *Hoare v. Graham*, 1811; *Spartali v. Benecke*, 1850, as explained by Williams, J., in *Field v. Lelean*, 1861; *Besant v. Cross*, 1851; *Han-*

a contingency,¹ or that it should be made out of a particular fund,² must be rejected; and where goods are sold under a written contract, silent as to the time, both for their removal and of that for payment, parol evidence is inadmissible to prove, either that the goods were to be removed immediately,³ or were sold on a credit of six months.⁴

§ 1152. Again, where a written agreement of partnership is unlimited as to the time of commencement, parol evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, is inadmissible;⁵ where there is a written memorandum of lease at a certain rent, parol evidence of a contemporaneous verbal agreement to also pay the ground-rent to the ground-landlord,⁶ or by the landlord where the lease contained covenants as to title, to discharge an incumbrance not created by himself,⁷ must be rejected; where a ship is particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, is inadmissible except in support of a charge of fraud;⁸ evidence of a promise by a lessee to work a certain quantity of the subject of a mining lease is inadmissible;⁹ evidence that the grantee's name in a deed is a mistake is also inadmissible;¹⁰ and where a deed conveyed the messuage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a

son *v.* Stetson, 1827 (Am.); Spring *v.* Lovett, 1831 (Am.); Sayward *v.* Stevens, 1854 (Am.); and other American cases cited Greenleaf on Ev., 15th edit., 1892, note to § 281, at p. 377.

¹ *Abrey v. Crux*, 1869; *M'Dougall v. Field*, 1872 (Ir.); *Rawson v. Walker*, 1816; *Adams v. Wordley*, 1836; *Foster v. Jolly*, 1835; *Free v. Hawkins*, 1817; *Woodbridge v. Spooner*, 1819; *Stott v. Fairlamb*, 1883; *Moseley v. Hanford*, 1830; *Erwin v. Saunders*, 1823 (Am.); *Hunt v. Adams*, 1811 (Am.). See *Salmon v. Webb*, 1852, H. L.

² *Campbell v. Hodgson*, 1819.

³ *Greaves v. Ashlin*, 1813 (Ld. Ellenborough). See, also, *Harnor v. Groves*, 1855.

⁴ *Ford v. Yates*, 1841. There it

was erroneously assumed, that a memorandum, which really contained the name of only one of the parties, was sufficient to satisfy the Statute of Frauds. See *Lockett v. Nicklin*, 1848, cited ante, § 1134.

⁵ *Dix v. Otis*, 1827 (Am.).

⁶ *Preston v. Merceau*, 1775. See *The Isabella*, 1799; *White v. Wilson*, 1800; *Rich v. Jackson*, 1794; *Brigham v. Rogers*, 1822 (Am.).

⁷ *Howe v. Walker*, 1855 (Am.).

⁸ *Pickering v. Dowson*, 1813. See, also, *Stucley v. Baily*, 1862; *Powell v. Edmunds*, 1810; *Pender v. Fobes*, 1838 (Am.); *Wright v. Crookes*, 1840.

⁹ *Lyn v. Miller*, 1855 (Am.); and other American cases cited in Greenleaf on Ev., 15th edit. (1892), note to § 281, at p. 379.

¹⁰ *Crawford v. Spencer*, 1851 (Am.).

close, not included in the map and schedule, had always been occupied and treated as part of Gotton farm, was rejected.¹

§ 1153. Further, on a sale (prior to the Apportionment Act, 1870²) of land let for years, a contemporaneous parol agreement, that the current quarter's rent should be apportioned between vendor and purchaser, was inadmissible.³ It was, moreover, till recently, supposed that when a promissory note was in its terms joint, evidence could in no case be given that one of the makers was merely a surety, and that the payee had given time to the principal;⁴ but this doctrine has been held inapplicable to a case where a money-lender has made advances on the security of a joint and several note, being well aware at the time that one of its makers was a surety.⁵ In such a case the surety, notwithstanding the form of the note, may now set up as a defence that when the note was made he was known by the lender to be a surety, and that, without his consent, the principal has had time given to him by the lender.⁶ It appears, however, still to be law that in general if a party sign a bill of exchange, a charter-party,⁷ or indeed, any written contract, in his own name, and there is nothing in the instrument to show that he intends *only* to sign on behalf of a named principal,⁸ he cannot avoid his personal liability by parol evidence that he merely signed as agent, and that the other party knew this.⁹ If, however, it is sought on the one hand to charge with liability,¹⁰ or on the other to give the benefit of the contract

¹ *Barton v. Dawes*, 1850; *Llewellyn v. Ld. Jersey*, 1843. See post, §§ 1224, 1225.

² 33 & 34 V. c. 35.

³ *Flinn v. Calow*, 1840.

⁴ *Abbott v. Hendricks*, 1840 (*Tindal, C.J.*); *Manley v. Boycot*, 1853; *Strong v. Foster*, 1855. See *Davies v. Stainbank*, 1855; *Riley v. Gerrish*, 1851 (*Am.*); and *Myrick v. Dame*, 1852.

⁵ *Greenough v. McClelland*, 1861; *Mutual Loan Fund Assoc. v. Sudlow*, 1858; *Pooley v. Harradine*, 1857; *Taylor v. Burgess*, 1859; *Lawrence v. Walmsley*, 1862; *Bristow v. Brown*, 1862 (*Ir.*); *Bailey v. Edwards*, 1865; *Overend, Gurney & Co. v. Oriental, &c. Corp.*, 1874, *H. L.*

⁶ *Id.*

⁷ *Hough v. Manzanos*, 1879.

⁸ *Gadd v. Houghton*, 1877, *C. A.*

⁹ *Higgins v. Senior*, 1841; *Roy. Ex. Ass. Co. v. Moore*, 1863; *Sowbery v. Butcher*, 1834; *Magee v. Atkinson*, 1837; *Jones v. Littledale*, 1837; *Stackpole v. Arnold*, 1814 (*Am.*); *Hunt v. Adams*, 1811 (*Am.*); *Shankland v. City of Washington*, 1831 (*Am.*); *Lefevre v. Lloyd*, 1814. But see *Holding v. Elliott*, 1860, cited ante, § 804. See, also, *Williamson v. Barton*, 1862.

¹⁰ *Paterson v. Gandasequi*, 1812; cited and confirmed in *Higgins v. Senior*, 1841 (*Parke, B.*); *Calder v. Dobell*, 1871; *Young v. Schuler*, 1883, *C. A.*

to,¹ an unnamed principal, such evidence will be received; and this, too, whether the Statute of Frauds does or does not require the agreement to be in writing; for, in the cases first cited the parol evidence would clearly contradict the written agreement, in these we are now considering it would have no such effect, since without denying the agreement to be binding on the party whom it purported to bind, it would show that another party, namely the principal, was also bound, on the well-known doctrine that the act of an authorised agent is, in law, the act of the principal.²

§ 1154. Still less is the rule excluding parol evidence to contradict or vary a written document violated by it being held (as it is) that a person who describes himself in a written contract as agent of an unnamed principal, may be shown by the party with whom he contracted to be the real principal.³ He may even in an action by himself against the other contracting party, repudiate the character of agent and adopt that of principal; and on furnishing proof that he entered into the agreement on his own behalf, will be entitled to recover.⁴ Where, however, an agent, employed to enter into a charter-party, described himself in the instrument as the owner of the ship, in an action by the principal on the charter-party, it was held that parol evidence that the agent acted merely as agent could not be given, since it would directly contradict the written document.⁵

§ 1155. So strict is the rule that parol evidence cannot be received to vary or contradict a written document that even the subsequent admission of a party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein contained.⁶ Thus, the plain language of a deed purporting to convey a messuage in the occupation of A., *with the appurtenances*, cannot be contradicted either by the written conditions of sale excepting the garden, or by the declarations of the grantee that he had not purchased it.⁷

§ 1156. Still less will any statements made by the writer of an

¹ Garrett v. Handley, 1825; Bateman v. Phillips, 1812; both cited and confirmed in Higgins v. Senior, 1841, as reported 8 M. & W. 844 (Parke, B.).

² Higgins v. Senior, 1841 (Parke, B.).

³ Carr v. Jackson, 1852.

⁴ Schmeltz v. Avery, 1851.

⁵ Humble v. Hunter, 1848.

⁶ Pain v. M'Intier, 1804 (Am.). See, also, Townsend v. Weld, 1811 (Am.).

⁷ Doe v. Webster, 1840.

instrument be receivable in evidence with the view of varying its terms. Thus, where a testator devised to his eldest son his residence with the *buildings to the same adjoining*, and left to his second son all his other real property, evidence of declarations made by him, while giving instructions for his will, showing that he intended some other cottages which adjoined his residence when such will was made to pass to such second son, was rejected.¹ Where, too, in a will, a complete *blank* is left for the description of the legatee or devisee,² or for the amount of the legacy, or for the description of the estate or thing devised,³ no parol evidence, however strong, will be allowed to fill it up as intended by the testator.

§ 1157. Neither⁴ under a devise by a testator of all his freehold and real estate “in the county of Limerick, and in the city of Limerick,” he having no real estates in the *county* of Limerick, but only possessing landed property consisting of estates in the county of Clare, which were not mentioned in the will, and a small estate in the *city* of Limerick, which was inadequate to meet the testamentary charges, was the devisee allowed to show by parol evidence, that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that such conveyancer by mistake⁵ erased the words “county of Clare;” and that the testator, after keeping the will by him for some time, executed it without advertent to the alteration as to that county. Tindal, L. C. J., in pronouncing the joint opinion of himself, Lds. Lyndhurst, and Brougham, L. C.,⁶ said “The plaintiff contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of

¹ Doe v. Holtom, 1832.

² Hunt v. Hort, 1791; Miller v. Travers, 1832 (Tindal, C.J.).

³ Miller v. Travers, 1832 (Tindal, C.J.); Taylor v. Richardson, 1853.

⁴ Miller v. Travers, 1832. See,

also, In re The Clergy Society, 1856.

⁵ See, also, Francis v. Dichfield, 1742 (Ld. Hardwicke).

⁶ Ld. Lyndhurst, C.B., and Tindal, C.J., assisted the Ld. C. in this case.

the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.”¹

§ 1158. Extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is thus inadmissible. This, however, is chiefly because the parties must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and secondly, because of the mischiefs which would result, if verbal testimony were in such cases received. It is, however, also a principle that, *parol evidence may in all cases of doubt be adduced, to explain the written instrument*; or, in other words, to enable the court to discover the meaning of the terms employed, and to apply them to the facts.² Such a “doubt” as is here meant may arise from one or both of the two following causes; either the *language* of the instrument may be *unintelligible* to the court, or, at least, be *susceptible of two or more meanings*; or the *persons or things mentioned may require to be identified*.³ The rule, consequently, lets in evidence of two descriptions.

§ 1159.⁴ First, if the characters, in which the instrument is written, are in short-hand,⁵—or are otherwise difficult to be deciphered,—or if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations,—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms

¹ Miller v. Travers, 1832.

(Parke, B., and Tindal, C.J.).

² Shore v. Wilson, 1842, H. L. (Parke, B.).

⁴ Gr. Ev. § 280, in part.

³ Shore v. Wilson, 1842, H. L.

⁵ See Kell v. Charmer, 1856, cited post, § 1196.

employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions.¹ In several cases, wills, written in a scarcely legible hand, have been interpreted by Courts of Equity, with the assistance of persons skilled in writing.² The practice of proving translations of foreign documents is so notorious as to require no authority to support it.

§ 1160. The remainder of the rule is established beyond dispute by an absolute crowd of decisions. The testimony resorted to under the second branch of this rule consists of evidence of *usage*,³—that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognised practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning,—and the jury are asked to presume that the parties, who employed these expressions, used them, in the conventional sense, as explained by the witnesses.⁴

§ 1161. Evidence of *usage* to explain the meaning of particular words in a written instrument may either go to show that the words employed are purely local or technical;—that is, words which are not of universal use, but familiarly known and employed, either in a particular district, or in a particular science or trade, or by a particular class of persons;—or to show that such words have two meanings, the one common and universal, the other technical, peculiar or local. In either case, it will be admissible to define and explain the meaning of the language employed. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as “Godly preachers of Christ’s Holy Gospel,” on its becoming long afterwards necessary to determine what persons were entitled

¹ *Shore v. Wilson*, 1842, H. L. (Parke, B., and Tindal, C. J.); *Wigr. Wills*, 61.

² *Goblet v. Beechey*, 1829; *Masters v. Masters*, 1718; *Norman v. Morrell*, 1799.

³ As will presently be seen (post, §§ 1204, 1205), the word “usage” is

frequently used by lawyers to denote a species of evidence, often admitted for the purpose of explaining ancient ambiguous grants, and consisting in the proof of the contemporaneous acts of the grantors or grantees, in relation to the property conveyed.

⁴ See ante, § 181.

to this charity, extrinsic evidence was admitted to show, that at the time when the charity was founded a religious sect existed, who applied this particular phraseology (which might seem at first sight of a far wider interpretation), to Protestant Trinitarian Dissenters, of which sect the founder was a member.¹ Where, however, words have by usage two meanings, in addition to giving evidence of this it will also be necessary to prove such additional circumstances, as will raise a presumption that the parties intended to use the words in what logicians call their second intention, unless this can be inferred from reading the instrument itself.

§ 1162. In accordance with the principle just stated, various words in written documents which *primâ facie* present no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connexion with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were *usually* received, when employed in cases similar to that under investigation.²

¹ *Shore v. Wilson*, 1842, H. L. (Ld. Cottenham). See, also, *Drummond v. Att.-Gen.*, 1849, H. L.; and 7 & 8 V. c. 45, noticed ante, § 75.

² Some of the principal expressions which have been interpreted in this way, stated in alphabetical order, are the following:—"All faults" (*Whitney v. Boardman*, 1875 (Am.)); "Arrived in dock" in a charter-party (*The Steamship Co. Norden v. Dempsey*, 1876); "Barrel" (*Miller v. Stevens*, 1868 (Am.)); "Best oil" in a contract (*Lucas v. Bristow*, 1858); "Corn" (*Mason v. Skurray*, 1780; *Moody v. Surridge*, 1798; *Scott v. Bourdillion*, 1806); "Cotton in bales" (*Taylor v. Briggs*, 1827; *Gorriison v. Perrin*, 1857); "Current funds" (*Thorington v. Smith*, 1868 (Am.)); "Crop of flax" (*Goodrich v. Stevens*, 1871 (Am.)); "Days," in a bill of lading, as meaning working days (*Cochran v. Retberg*, 1800); "Duly honoured," as applied to a bill of exchange (*Lucas v. Groning*, 1816); "Expected to arrive about November next" is a phrase which in a bought note is a mere description, and creates no contract as to time (*Bold v. Rayner*, 1836); "F.o.b."

(*Silberman v. Clark*, 1884 (Am.)); "Freight" (*Peisch v. Dixon*, 1815 (Am.)); *Gibbon v. Young*, 1818; *Lewis v. Marshall*, 1844); "Fur" (*Astor v. Union Insee. Co.*, 1827 (Am.)); "Inhabitant" (*R. v. Mas-hiter*, 1837; *R. v. Davie*, 1837); "In turn to deliver" in a charter-party (*Robertson v. Jackson*, 1845; *Leidemann v. Schultz*, 1853); "Level," as understood by miners (*Clayton v. Gregson*, 1836); "Months," in a charter-party, as meaning calendar months (*Jolly v. Young*, 1800, recognised *Simpson v. Margitson*, 1847); "Payable in trade" (*Dudley v. Vose*, 1873 (Am.)); "Pig iron" (*Mackenzie v. Dunlop*, 1856, H. L. (Ld. Cranworth, C.)); "Regular turns of loading" (*Leidemann v. Schultz*, 1853); "Salt" (*Journu v. Bourdieu*, 1787); "Spitting of blood," as a term in a policy of insurance (*Singleton v. St. Louis, &c.*, 1877 (Am.)); "Street," as used in the Public Health Act (*Elliott v. South Devon R. C.* 1848); "Ten pockets of Kent hops at five pounds," as meaning in the hop trade at five pounds per cwt. (*Spicer v. Cooper*, 1841); "Thousand," as locally ap-

§ 1163. By an extension of this same principle of construction, the expression "in the month of October" has been allowed to be shown by parol evidence to be the usage of merchants to fix the exact part of that month for the sailing of a vessel;¹ the words warranted "to depart with convoy," by the same usage to show at what place a ship usually took up convoy for a voyage such as the one contemplated;² the responsibility of an underwriter for "general average" under an ordinary policy of insurance on a ship and cargo, may be so limited by a custom of trade as not to extend to jettison of goods which have been stowed on deck;³ "weekly accounts" in a building contract, by the usage of trade, is a technical signification, meaning accounts of day-work only, exclusive of work which is capable of being measured;⁴ where agents have purported to sign "by telegraphic authority as agents," evidence has been admitted to show that by mercantile usage under such words the agents are not responsible for a term in the contract arising from a mistake in the transmission of the message;⁵ a London packer, who acknowledges the receipt of goods "on account of the vendor for the vendee," may prove that by usage, when packers signed receipts in this form, it is their duty not to part with the goods without the vendor's further orders;⁶ and evidence of usage may similarly be admitted to show that where a merchant has sent written instructions to his *del credere* agent in London, to sell "*on his account*," such agent is by the custom of the London corn trade, warranted in selling in his own name;⁷ and by custom brokers who do not disclose their principal,⁸ or who sign as "agents to merchants," but do not state within a certain time for whom they are agents,⁹ may be liable as principals.

plied to rabbits on a warren (Smith *v.* Wilson, 1832; recognised (Williams, J.) Shaw *v.* Wilson, 1842); "Weeks," as meaning in a theatrical contract only weeks during the theatrical season (Grant *v.* Maddox, 1846; and see, also, Myers *v.* Sarl, 1860). In Symonds *v.* Lloyd, 1859, the rule seems to have been strained to its utmost extent.

¹ Chaurand *v.* Angerstein, 1791. See, also, Robertson *v.* Jackson, 1845; and U. S. *v.* Breed, 1832 (Am.).

² Lethulier's case, 1692; recognised by Williams, J., in Shore *v.* Wilson, 1842.

³ Miller *v.* Tetherington, 1861. See Kidston *v.* The Empire Marine Ins. Co., 1866.

⁴ Myers *v.* Sarl, 1860.

⁵ Lilly & Co. *v.* Smiles, 1892.

⁶ Bowman *v.* Horsey, 1837 (Ld. Abinger).

⁷ Johnston *v.* Usborne, 1841.

⁸ Fleet *v.* Murton, 1871.

⁹ Hutchinson *v.* Tatham, 1873.

§ 1164. The reports contain, again, many cases, where the language of *policies* has been explained by evidence of the understood practice of making voyages in particular branches of trade.¹ In such cases it is unnecessary for the assured or his broker to communicate the usage to the underwriter, for, as Lord Mansfield observed, “every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself.”² Accordingly, though, under the words “at and from,” a policy would appear at first sight to attach upon the ship’s first mooring in a harbour on the coast, yet these expressions, in a Newfoundland policy, were allowed to be explained by evidence that by usage they in that trade mean that the risk is not to commence till the expiration of the fishing (technically called “banking”), or of an intermediate voyage.³

§ 1165. But evidence of *usage*, though admissible to explain what is doubtful, is *not admissible to contradict or vary* what is plain.⁴ If the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless such words, if interpreted according to their strict legal acceptation, be wholly insensible with reference either to the context or to the extrinsic facts.⁵ Thus, where a word denoting weight, measure, or number, has had a definite meaning attached to it by the Legislature, any party using that word in a written contract, or a will, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some part of the writing itself.⁶ Thus parol evidence of custom of the country is not admissible to show that the words “Lady Day” or “Michael-

¹ See *Trueman v. Loder*, 1840; and *Milward v. Hibbert*, 1842.

² *Noble v. Kennaway*, 1780; cases cited in following note; *Da Costa v. Edmunds*, 1815 (Ld. Ellenborough).

³ *Vallance v. Dewar*, 1808 (Ld. Ellenborough); *Ougier v. Jennings*, 1800 (Ld. Eldon); *Kingston v. Knibbs*, 1809 (Ld. Ellenborough).

⁴ *Blackett v. Roy. Ex. Ass. Co.*, 1832 (Ld. Lyndhurst); *Crofts v. Marshall*, 1836 (Ld. Denman). See, also, *Phillips v. Briard*, 1856; *Abbott*

v. Bates, 1876.

⁵ *Wigr. Wills*, 11, 12, cited ante, § 1131, n.

⁶ *Smith v. Wilson*, 1832 (Ld. Tenterden, and Parke, J.); *O'Donnell v. O'Donnell*, 1882 (Ir.); *Hockin v. Cooke*, 1791; *Att.-Gen. v. Cart Plate Glass Co.*, 1792; *Noble v. Durell*, 1789; *Sleght v. Rhineland*, 1806 (Am.); *Frith v. Barker*, 1807 (Am.); *Stoever v. Whitman*, 1814 (Am.); *Henry v. Risk*, 1788 (Am.).

mas" in a *lease* (made since the Act of Parliament for altering the style) do not respectively mean the 25th of March and the 29th of September, but relate to the old style.¹ Words referring to a particular relation (such as "child"² or "grandson"³), will, where there is such an one, import the *legitimate* relation of that name, and parol evidence may not show that an *illegitimate* one was meant. But such evidence is receivable if there be no such legitimate relation,⁴ or if the context show that the word is used to include a relation who does not really fill that exact relationship.⁴

§ 1166.⁵ In accordance with the above principle, parol evidence has been rejected when offered to show that on a warranty of "prime singed bacon," it is the practice in the trade to receive bacon slightly tainted as "prime" singed;⁶ that upon a policy on a ship, her tackle, apparel, boats, &c., underwriters, by usage, never pay for loss of boats slung upon the quarter, outside of the ship;⁷ that in a memorandum of excepted articles in a fire policy, "glass ware in casks," according to the understanding of insurers and insured, only means such ware in open casks;⁸ that in a bill of lading containing the usual clause, "the dangers of the sea only excepted," shipowners, by the custom of the trade, are only liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured and stowed;⁹ that by the custom of a particular port where merchandise is to be delivered and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," this is a stipulation for the benefit of the buyer, but not of the seller;¹⁰ or that on a charter-party containing terms clearly defining who is to bear the expense of delivery, there is a custom regulating the subject.¹¹

¹ Doe v. Lea, 1809. In some cases of *parol* demises, such evidence has indeed been received: Doe v. Benson, 1821; Furley v. Wood, 1794 (Ld. Kenyon); but whether the distinction between a letting by deed, and a letting by parol, would now be sustained, may be seriously doubted.

² Ellis v. Houstoun, 1878.

³ Doe v. Taylor, 1849 (Am.).

⁴ Bowers v. Bowers, 1850 (Am.); Re Cahn, 1877 (Am.).

⁵ Gr. Ev. § 292, in part.

⁶ Yates v. Pym, 1816. See, also,

Macolmson v. Morton, 1847 (Ir.).

⁷ Blackett v. Roy. Ex. Ass. Co., 1832. See Hall v. Janson, 1855. But see, also, Miller v. Tetherington, 1862; and Myers v. Sarl, 1861, both cited ante, § 1162.

⁸ Bend v. Georgia Ins. Co., 1842 (Am.).

⁹ The Schooner Reeside, 1837 (Am.).

¹⁰ Sotilichos v. Kemp, 1848.

¹¹ The Nifa, 1892. And see also Scrutter v. Childs, 1877; Hayton v. Irwin, 1879, C. A.; Lishman v. Christie, 1887, C. A.

§ 1167. On the same principle, evidence that by the custom of the trade, "bills" meant "approved bills," and that the vendor could reject any bill of which he did not approve, was rejected where there had been a sale of goods through a London broker under a written contract stipulating that payment should be made "by bills."¹

§ 1168. On the other hand, parol evidence of usage or custom is² certainly sometimes admissible "*to annex incidents to contracts*,"—that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, when a bill of exchange or promissory note, payable either at a fixed time or on demand (not being one payable in England upon demand³) is silent as to any days of grace, in Great Britain three days, called "days of grace" are (subject to provisions as to holidays) added to the time of payment as fixed by the bill,⁴ and where a bill is payable elsewhere than in England parol evidence of the known and established usage of the country or place is admissible to show on what day the grace expired.⁵ Parol evidence is, more-

¹ *Hodgson v. Davies*, 1810 (Lord Ellenborough). The learned judge, however, in a subsequent stage of the case, admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract within a reasonable time after the name of the purchaser had been communicated to them, but serious doubts have been entertained whether he

was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words, to be incorporated in it. See *Trueman v. Loder*, 1840.

² Gr. Ev. § 294, as to four lines.

³ Which is not entitled to any days of grace. See 45 & 46 V. c. 61, §§ 10—14.

⁴ See "The Bills of Exchange Act, 1882" (45 & 46 V. c. 61), § 14.

⁵ In *Renner v. Bank of Columbia*, 1824 (Am.), the decisions on this point are reviewed by Thompson, J. Chitty on Bills, 374—376, contains the following table, on the entire accuracy of which too much reliance should not, however, be placed, as to the days of grace allowed in various places:—

Altona—12 days, Sundays and holidays included, and bills falling due on a Sunday or holiday must be paid, or in default thereof protested, on the day previous: *America*—3 days: *Amsterdam*—None, abolished since the Code Napoleon: *Antwerp*—None, abolished by the Code Napoleon: *Berlin*—3 days, when bills do not fall due on a Sunday or holiday, in which case they must be paid or protested the day previous: *Brazil*—15 days, Rio de Janeiro, Bahia, including Sundays, &c., as in the last case: *England, Scotland, Wales, and Ireland*—3 days, subject to 45 & 46 V. c. 61, §§ 10 and 14: *France*—None, abolished by the Code Napoleon, livre i. tit. 8, § 5, pl. 135; 1 Pardess. 189; ten days were formerly allowed (Poth. pl. 14, 15): *Frankfort-on-the-Maine*—4 days, except on bills drawn at sight, Sundays and holidays not included: *Genoa*—None, abolished by the Code Napoleon: *Hamburg*—Same as *Altona*:

over, admissible to prove that by local custom in particular trades, general contracts of hiring and service are defeasible on giving a month's notice on either side;¹ or that persons employed have certain holidays in the year, and the Sundays to themselves;² or that on the death of a tenant for life a heriot is due, and this, though no mention of it is made in the lease,³ or that a lessee by deed is entitled to an away-going crop—though no such right be reserved in the deed;⁴ or that a publican, holding premises under a written agreement, reserving a weekly rent, but otherwise silent as to the period of the tenancy, is considered to have a yearly tenure, though the rent be payable weekly,⁵ when he pays in advance the yearly victualler's licence.

§ 1169. Parol evidence is also admissible to show that by usages of particular trades all sales of certain goods are by sample, although this term be not expressed in the bought and sold notes;⁶

Ireland—3 days: *Leghorn*—None: *Lisbon and Oporto*—15 days on local, and 6 on foreign bills; but if not previously accepted, must be paid on the days they fall due: *Naples*—None, abolished by the Code Napoleon: *Palermo*—None: *Petersburgh*—Bills drawn *after date* are entitled to 10 days' grace, those drawn *at sight* to only 3 days, and those at any number of days *after sight*, none whatever; but bills received and presented after they are due are nevertheless entitled to 10 days' grace. In these days of grace are included Sundays and holidays, also the day when the bill falls due, on which days they cannot be protested for non-payment, but on the morning of the last day of grace payment must be demanded, and if not complied with, the bill must be protested before sunset: *Rio de Janeiro, Bahia, and other parts of Brazil*—Days of grace on foreign bills are 15, including holidays and Sundays, and if due on any such day, must be paid, or in default thereof protested, on the previous day: *Rotterdam*—None, abolished by the Code Napoleon: *Scotland*—3 days: *Spain*—Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland bills; at Cadiz only 6 days' grace. When bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor any bills, unless accepted prior to maturity: *Trieste*—3 days on bills drawn after date, or any term after sight not less than 7 days, or payable on a particular day; but bills presented after maturity must be paid within 24 hours. Sundays and holidays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the bill protested, on the first following open day: *Venice*—6 days, in which Sundays, holidays, and the days when the bank is shut, are not included: *Vienna*—Same as Trieste: *Wales*—3 days.

¹ *Parker v. Ibbetson*, 1858.

² *R. v. Stoke-upon-Trent*, 1843.

³ *White v. Sayer*, 1622.

⁴ *Wigglesworth v. Dallison*, 1778-79; *Senior v. Armytage*, 1816; explained (*Parke, B.*) in *Hutton v. Warren*, 1836, as reported 1 M. & W. 476; *Hutton v. Warren*, 1836.

See *In re Estate of M. of Waterford*, 1871 (Ir.).

⁵ *Lundy v. Reilly*, 1858 (Ir.).

⁶ *Syers v. Jonas*, 1848; *O'Neill v. Bell*, 1866 (Ir.). See, also, *Brown v. Byrne*, 1854; *Cuthbert v. Cumming*, 1855; *Lucas v. Bristow*, 1858.

or (where it is not inconsistent with the contract itself¹) that in the City every buying broker, who does not, at the date of the bargain, name his principal, renders himself liable to be treated by the vendor as the purchaser;² or that a person who contracts expressly as agent is personally liable, if he does not disclose the name of his principal within a reasonable time;³ or that, even where there has been a written contract for the sale of mining shares upon the terms that they shall be *paid for* "half in two, and half in four months," which was silent as to the time of *delivery*, the vendor is, by the usage of brokers, not bound to deliver them without contemporaneous payment.⁴ Similarly, where a horse is sold at a repository (even by private contract) with a written warranty of soundness, in an action for breach of warranty against him, the vendor may show that, by a printed regulation hung up in the repository, warranties only remain in force till twelve o'clock on the day after the sale, that the plaintiff was aware of this regulation, and yet that he made no complaint within the specified time.⁵ Moreover, a custom that all steamships having a general cargo, coming into a certain port, shall discharge their goods on the quay, may be annexed even to a bill of lading of goods which says that the goods are to be discharged in good order from the ship's tackles;⁶ nor is a custom that all goods may, unless demanded within twenty-four hours of a ship's arrival, be landed on the quay, inconsistent with one which provides that goods are to be delivered by a person appointed by the ship's agents, the delivery to be according to the custom of the port.⁷

§ 1170. The rule of annexing incidents by parol, which has time out of mind been adopted in explanation of mercantile proceedings, is now generally applied to all contracts respecting any transaction wherein known usages have prevailed. It rests on the presumption that the parties did not intend to express in writing the whole of

¹ Barrow v. Dyster, 1884.

² Dale v. Humfrey, 1858; Imperial Bk. v. Lond. & St. Katherine's Dock Co., 1877 (Jessel, M.R.); Fleet v. Murton, 1872. See Southwell v. Bowditch, 1876, C. A.

³ Pike v. Ongley, 1887, C. A.; Hutchinson v. Tatham, 1873.

⁴ Field v. Lelean, 1861; overruling Spartali v. Benecke, 1850. See Godts v. Rose, 1855.

⁵ Bywater v. Richardson, 1834. See Smart v. Hyde, 1841; and Foster v. Mentor Life Assur. Co., 1854.

⁶ Marzetti v. Smith, 1883, C. A.

⁷ Aste v. Stumore, 1884, C. A.

the agreement by which they were to be bound, but to make their contract with reference to the established usages and customs relating to the subject-matter.¹ Here, however, it must be borne in mind, that "incidents" are frequently "annexed" to contracts, and conditions implied, not only by the usage or custom of trade, which is always a matter of evidence, but also by the law-merchant (which is judicially noticed without proof²), by the common law,³ and, occasionally, by statute. This whole doctrine of legal implication is, however, abstruse, and the soundest lawyers are often at fault in applying it. On some constantly occurring matters the law has, however, been settled by decisions.⁴

§ 1171. For instance, it now is an undoubted principle of *marine insurance* that a warranty of seaworthiness⁵ at the commencement of the risk is, in the absence of express stipulation, implied,⁶ in every voyage-policy, whether on a ship, on goods, on freight, or on salvage.⁷ In other words, the law annexes to every marine policy, as a necessary incident thereto, the condition that the ship should be seaworthy either at the commencement of the voyage, or in port when preparing for it, or (if the insurance is on a vessel already at sea), that she was seaworthy when the voyage commenced. Other conditions which are equally implied in a policy of marine insurance are conditions not to deviate unnecessarily from the usual course of the voyage, except in order to save life,⁸ to commence it in a reasonable time, and to disclose all material circumstances.⁹ The non-performance of any of these conditions, whether fraudulent or not,¹⁰ avoids the policy. On the other hand, English law implies no warranty in a policy of marine insurance that the lighters employed at the port of discharge to land the cargo shall be sea-

¹ *Hutton v. Warren*, 1836 (Parke, B.); *Gibson v. Small*, 1853 (id.), H. L.

² Ante, § 5.

³ *Gibson v. Small*, 1853 (Parke, B.), H. L.

⁴ See post, note to § 1177A.

⁵ This is a relative term, depending on the nature of the ship, as well as of the voyage insured; and in an action on a policy, parol evidence as to these facts is admissible to show the amount of seaworthiness implied :

Burges v. Wickham, 1864; *Clapham v. Langton*, 1865. See, also, *Bouillon v. Lupton*, 1863; *Daniels v. Harris*, 1874; and *Thin v. Richards*, 1892, C. A.

⁶ See *Quebec Marine Ins. Co. v. Commer. Bk. of Canada*, 1870.

⁷ *Knill v. Hooper*, 1857.

⁸ *Scaramanga v. Stamp*, 1880, C. A.

⁹ See *Proudfoot v. Montefiore*, 1867.

¹⁰ *Gibson v. Small*, 1853, H. L. See, also, *Biccard v. Shepherd*, 1861, P. C.

worthy;¹ none that the vessel shall continue seaworthy after the voyage has commenced; none that an originally competent crew shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none, where the voyage has originally commenced, that pilots shall be taken on board at proper places, unless, perhaps, where required by Act of Parliament; none on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage; although these conditions are by law or custom imposed in America.² In the case of a time-policy, the law does not imply, as necessarily incident to the policy, any warranty or condition that the ship should be seaworthy either at the date of the insurance,³ or at the commencement of the voyage during which the policy attaches,⁴ and this, too, as it would appear, even where the ship is outward-bound, and starts from a British port where the owner resides.⁵ In a voyage-policy on goods, again, no warranty that the goods are seaworthy for such voyage can be implied.⁶

§ 1172. The law, moreover, annexes to, or implies in, every contract by a common carrier, or by a shipowner,⁷ whether a common carrier or not, for the carriage for hire, whether by land⁸ or by water,⁹ of *goods* (which term includes live animals¹⁰) an insurance on his part that he will,—unless prevented either by “the act of God or by the public enemies of the Crown,” the “proper vice” of the animal, or the inherent quality of the article,¹¹—safely deliver at its destination the property entrusted to him. Consequently, the carrier of goods by land impliedly warrants that his carriage is roadworthy, and the shipowner that his ship is seaworthy.¹² These

¹ Lane v. Nixon, 1866.

² Gibson v. Small, 1853 (Parke, B.), H. L. See, also, Biccarrd v. Shepherd, 1861, P. C.

³ Gibson v. Small, 1853, H. L.

⁴ Gibson v. Small, 1853 (Parke, B., and Ld. Campbell), H. L.; Jenkins v. Heycock, 1853, P. C.; Michael v. Tredwin, 1856; Dudgeon v. Pembroke, 1877, H. L.

⁵ Thompson v. Hopper, 1856 (Erle, J., diss.); Fawcus v. Sarsfield, 1856 (id.).

⁶ Koebel v. Saunders, 1864.

⁷ Nugent v. Smith, 1876.

⁸ Riley v. Horne, 1828.

⁹ Lyon v. Mells, 1802; Liver Alkali Co. v. Johnson, 1874.

¹⁰ McManus v. Lanc. & Yorks. Rail. Co., 1859; Nugent v. Smith, 1876; Tattershall v. Nat. Steamship Co., 1884.

¹¹ Kendall v. Lond. & S. W. Rail. Co., 1872; Blower v. Gt. W. Rail. Co., 1872; Nugent v. Smith, 1876, C. A.

¹² Kopitoff v. Wilson, 1876; Cohn v. Davidson, 1877; Steel v. State Line Steamship Co., 1877, H. L. See, also, Tattershall v. Nat. Steamship Co., 1884; and ante, § 187.

rules do not extend to forwarding agents (as distinguished from common carriers), who have made special contracts with their employers.¹ Neither do they apply to the carriers of *passengers*, who do not impliedly warrant either the roadworthiness of their vehicles, or the seaworthiness of their vessels, so as to render themselves liable for injuries caused by mere *latent* defects,² although bound to exercise the utmost care and skill in the conduct of their business,³ and responsible for every accident occasioned by negligence, however slight.⁴

§ 1173. It is, however, a general proposition, that any person who, for a valuable consideration, engages with another to allow him the *personal* use for a specified purpose of a particular article, impliedly contracts that the article is reasonably fit for that purpose. Thus, notwithstanding that he has been guilty of no personal negligence, and has employed a competent builder, a man who admits persons on payment of money to seats in a building to view a public exhibition, impliedly undertakes that the building is fit for their reception; and if it falls, in consequence of careless or improper construction, he is liable.⁵ The distinction between a letting for *personal* use, and one for the use of goods, must be noted, for the obligation thus imposed (like similar obligations on carriers) does not apply in the latter case. For instance, it is inapplicable where *goods* (e.g., a carriage), taken charge of for reward, are placed in a building, which, without any want of reasonable care on the bailee's part (as e.g., where it has just before been built by a competent builder), falls down through some defect in construction.⁶

§ 1174. Certain implied contracts, as incident thereto, are also, in the absence of express stipulation, annexed by the law to all contracts for the *sale of estates*,⁷ whether freehold or leasehold. These are on the part of the vendor to the effect that he will make

¹ *Scaife v. Farrant*, 1875.

² *Readhead v. Midl. Rail. Co.*, 1869; *Buxton v. North East. Rail. Co.*, 1869; *Ingalls v. Bills*, 1845 (Am.).

³ This doctrine was applied to a job-master who had let out a carriage which broke down, in *Hyman v. Nye*, 1881.

⁴ See *John v. Bacon*, 1870; *Simpson v. Lond. Gen. Omnibus Co.*, 1873.

⁵ *Francis v. Cockrell*, 1870.

⁶ *Searle v. Laverick*, 1874.

⁷ See "The Conveyancing and Law of Property Act, 1881" (44 & 45 V. c. 41), §§ 3, 7.

out a good title,¹ and on the part of the purchaser to the effect that the damages to which he shall be entitled, if the title prove defective, shall be limited to the expenses actually incurred in the investigation, and shall be merely nominal for the loss of the bargain.² If, indeed, it turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever,³ or if, though able to furnish a marketable title, he has simply declined to do so, or to take the steps necessary for giving possession,⁴ the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts.⁵ The same result, too, would follow, should the question arise on an executed contract, and the indenture contain a covenant for quiet enjoyment.⁶

§ 1175. Certain implied undertakings and conditions are also annexed by the law to every lease or agreement to lease property. Thus, on the lessor's part every written agreement to grant a lease implies an undertaking that the lessor has title to grant a valid lease:⁷ on every *demise*, whether by deed or parol, the law implies conditions that the lessor will give possession of the premises to the lessee;⁸ and that, provided his own interest in them continues,⁹ the lessee shall have quiet enjoyment of them,¹⁰ including an inalienable

¹ *Souter v. Drake*, 1834; *Doe v. Stanion*, 1836 (Parke, B.); *Hall v. Betty*, 1842; *Worthington v. Warrington*, 1848. These cases overrule *George v. Pritchard*, 1826. See *Kintrea v. Perston*, 1856.

² *Flureau v. Thornhill*, 1775-6; *Walker v. Moore*, 1829; *Robinson v. Harman*, 1848 (Parke, B.); *Bain v. Fothergill*, 1874, H. L.; *Worthington v. Warrington*, 1849; *Pounsett v. Fuller*, 1856; *Sikes v. Wild*, 1861.

³ *Hopkins v. Grazebrook*, 1826; *Robinson v. Harman*, 1848. See *Sikes v. Wild*, 1861.

⁴ *Engell v. Fitch*, 1869. See *Godwin v. Francis*, 1870.

⁵ *Ld. Chelmsford's* opinion in *Bain v. Fothergill*, 1874, H. L., was that even if a man contracts for the sale

of real estate, knowing that he has no title, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses incurred by an action for breach of contract; he can only obtain other damages by an action for deceit. *Sed qu.*

⁶ *Lock v. Furze*, 1866.

⁷ *Stranks v. St. John*, 1867.

⁸ *Coe v. Clay*, 1829; *Jinks v. Edwards*, 1856; *Drury v. Macnamara*, 1855.

⁹ *Penfold v. Abbott*, 1863; *Adams v. Gibney*, 1830.

¹⁰ *Bandy v. Cartwright*, 1853; *Hall v. City of Lond. Brewery Co.*, 1862. See *Howard v. Maitland*, 1883, as to what constitutes a breach of a covenant for quiet enjoyment.

right to kill and take ground game thereon,¹ and shall not be evicted during the term.² On the lessee's part every demise, containing no express provision with respect to delivering up the premises, implies a contract not only to go out of them at the termination of the tenancy, but to restore the absolute possession to the landlord.³ A demise by parol, however, implies no undertaking for good title;⁴ nor does a lease legally imply any warranty that the subject-matter thereof,—whether house or land,—shall, either at the commencement, or during the continuance, of the term, be in a proper state for habitation or cultivation, or, in other respects, reasonably fit for the purpose for which it is taken.⁵ Neither does the law imply, from the relation of landlord and tenant, either any obligation on the part of the landlord to do substantial repairs on notice;⁶ or a condition—even where the landlord is bound by special agreement to keep the premises in repair during the tenancy,—that the tenant may quit if the repairs be not done.⁷

§ 1176. The letting, however, a *ready furnished* house (contrary to the rule in other cases) implies a warranty that the premises are in a reasonably habitable state. Therefore, if the furniture be insufficient, or defective, or the beds badly infested with vermin, or the drains out of order, or the house infected with contagion, the

¹ 43 & 44 V. c. 47 ("The Ground Game Act, 1880"), §§ 1, 3.

² Parke, B., in *Sutton v. Temple*, 1843; and in *Hart v. Windsor*, 1843.

³ *Henderson v. Squire*, 1869.

⁴ *Bandy v. Cartwright*, 1853; overruling contrary dicta by Parke, B., in *De Medina v. Norman*, 1842; and *Sutton v. Temple*, 1843. With respect to Ireland, § 41 of 23 & 24 V. c. 154, Ir., enacts that every lease, made since 1st January, 1861, shall, unless otherwise expressly provided thereby (see *Leonard v. Taylor*, 1874 (Ir.)), imply an agreement by the landlord that he has a good title, and that the tenant shall have quiet enjoyment. § 42 also enacts, that every such lease shall, unless otherwise expressly provided thereby, imply an agreement by the tenant to pay the rent, and all

taxes and impositions payable by the tenant, and to keep the premises in good and substantial repair, and to deliver them up in such repair on the determination of the lease, accidents by fire without the tenant's default excepted.

⁵ *Sutton v. Temple*, 1843; *Hart v. Windsor*, 1843; *Murray v. Mace*, 1874 (Ir.); *Manchester Bonded Warehouse Co. v. Carr*, 1880. These cases overrule *Edwards v. Etherington*, 1825; *Collins v. Barrow*, 1831; *Salisbury v. Marshall*, 1829. In *Erskine v. Adeane*, 1873, Ld. Romilly held "that every landlord warranted his tenant that he would not keep noxious things (such as yew trees) near the tenant's estate," but this ruling was reversed in C. A., 1873.

⁶ *Gott v. Gandy*, 1853.

⁷ *Surplice v. Farnsworth*, 1844.

tenant may quit without notice, unless,¹ perhaps, in the event of his having had an opportunity of inspecting the premises by himself or his agent before entering on the occupation.

§ 1177. The law of England, moreover, now, like the Roman,² the French,³ the Scotch,⁴ and, in part, the American law,⁵—on the sale or letting of a specific ascertained chattel annexes, as incident to the contract, an implied warranty of *title* and against incumbrances.⁶ Even before this was expressly enacted, a warranty might have been inferred either from the usage of trade, from the vendor's declarations, or from his conduct being such as to lead to the conclusion that he sold the property as "his own," or from the fact of the articles being bought in a shop professedly carried on for the sale of goods.⁷ The rule, such as it was, had in truth already been nearly eaten up by the exceptions.⁸ Moreover, on *executory* contracts of purchase and sale, where the subject is *unascertained*, and is afterwards to be conveyed, even the old law probably implied that both parties meant that a good title to that subject should be transferred, in the same manner as, under similar circumstances, it would imply that a merchantable article was to be supplied; for unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept goods if he discovered a defect in their title before delivery; since, if he did accept, and the goods were recovered from him, he would not be bound to pay for them, or having paid, he would be entitled to recover back the price, as on a consideration which had failed.⁹

§ 1177A. By statute, the custom of trade may annex an implied

¹ *Smith v. Marrable*, 1843; commented on by *Ld. Abinger*, in *Sutton v. Temple*, 1843; and approved in *Wilson v. Finch Hatton*, 1877.

² See *Domat*, bk. 1, tit. 2, § 2, art. 3.

³ *Code Civil*, c. 4, § 1, art. 1603.

⁴ *Bell on Sale*, 94.

⁵ *Defreeze v. Trumper*, 1806 (*Am.*); *Rew v. Barber*, 1824 (*Am.*).

⁶ See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 12. As to the old law under which there was no implied warranty, see *Morley v. Attenborough*, 1849 (*Parke, B.*);

Ormrod v. Huth, 1845 (*Tindal, C.J.*); *Hall v. Conder*, 1857; *Chapman v. Speller*, 1850; *Bagueley v. Hawley*, 1867.

⁷ *Morley v. Attenborough*, 1849 (*Parke, B.*); *Eicholz v. Bannister*, 1864.

⁸ *Sims v. Marryat*, 1851 (*Ld. Campbell*); *Eicholz v. Bannister*, 1864 (*Erle, C.J., and Byles, J.*).

⁹ *Morley v. Attenborough*, 1849 (*Parke, B.*). It is still undecided whether, on the sale of a *copyright*, the law would imply a warranty of title. See *Sims v. Marryat*, 1851.

warranty or condition *as to quality or fitness for a particular purpose* to a sale of goods.¹

§ 1178. If the buyer of goods expressly, or by implication, make known to the seller the particular purpose for which they are required, so as to show that he relies on the seller's skill and judgment, and the goods are of a description which it is the seller's business to supply, there is (except in the case of patent goods, or goods sold under a trade name) by statute an implied condition that the goods shall be reasonably fit for the purpose for which they are bought.² Where, too, goods are bought by description from a seller who deals in goods of that description (whether a manufacturer of them or not), there is an implied condition that the goods shall be of merchantable quality, provided that if the buyer has examined the goods, there is no warranty as regards defects which the examination ought to have revealed.³ Subject to the above enactment, where on a sale the purchaser has been afforded an opportunity of inspecting either the bulk or the sample, the maxim *caveat emptor* generally applies, and the law does not imply any warranty,⁴ either as to merchantable quality,⁵ or value,⁶ or fitness for the purpose for which such goods were bought,⁷ unless the defect be of such a nature as not to be readily discoverable by the inspection of the bulk or the sample.⁸ This doctrine even extends to the sale of food for the use of man,⁹ unless the vendor be a butcher, baker, vintner, or common victualler, in which case he will perhaps be presumed to have warranted that the provisions supplied by him were sound and wholesome.¹⁰ Even a sale *in a market* of a herd of

¹ See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71), § 14, subs. 3.

² *Id.*, subs. 1.

³ *Id.*, subs. 2. As to the former law, see *Wieler v. Schillizzi*, 1856; *Bigge v. Parkinson*, 1862; *Beer v. Walker*, 1877.

⁴ See 56 & 57 V. c. 71 ("The Sale of Goods Act, 1893"), § 14.

⁵ Independently, however, of the law of implied warranty, a party is not bound to accept and pay for chattels, unless they really answer the *description* of the articles which the vendor professed to sell, and the purchaser intended to buy: *Gom-*

pertz v. Bartlett, 1853; *Nichol v. Godts*, 1854; *Young v. Cole*, 1837; *Hall v. Conder*, 1857; *Josling v. Kingsford*, 1863.

⁶ *Kirkpatrick v. Gowan*, 1875 (Ir.). See *Smith v. Hughes*, 1871.

⁷ *Parkinson v. Lee*, 1802; recognised (Parke, B.) in *Sutton v. Temple*, 1843; and explained (Tindal, C.J.) in *Shepherd v. Pybus*, 1842.

⁸ *Mody v. Gregson*, 1868.

⁹ *Burnby v. Bollett*, 1847; *Le Neuville v. Nourse*, 1813; *Emmer-ton v. Matthews*, 1862.

¹⁰ *Burnby v. Bollett*, 1847 (Parke, B.).

animals, which the vendor has reason to believe were diseased (although by thus publicly exposing the animals for sale, his conduct might have been morally, or even statutably,¹ culpable), does not render him liable to an action by a purchaser for false representation where such animals are sold under an express condition that they are to be "taken with all faults," and without any warranty.²

§ 1179. No warranty is generally implied by the law from the execution by a manufacturer of a specific order for a *known and ascertained* chattel ordered by the buyer, that the article supplied shall be fit for the special purpose to which it is intended to be applied.³ But such a warranty is implied by law where it may fairly be inferred that the purchaser, instead of depending on his own judgment, relied on the skill and knowledge of the vendor,⁴ and no exception will be recognised in the case of latent undiscoverable defects.⁵ This doctrine specially applies to cases where the articles are supplied directly by the manufacturer;⁶ and sometimes extends to natural products as well as to manufactured articles, so that in a case where a seed-dealer had sold some rape, knowing that the purchaser required it for seed, the contract was held to contain an implied warranty that the rape was good growing seed, fit for germination.⁷

§ 1179A. Moreover, on a sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, in the absence of any usage, in the particular trade or as regards the particular goods, to supply goods of other makers, there is an implied contract that the goods supplied shall be of the manufacturer's own make.⁸

§ 1180. The vendor of any article with a trade mark or description upon it, is also, by the Merchandise Marks Act, 1887, presumed to have contracted that the mark is genuine and the

¹ See 57 & 58 V. c. 57 ("The Diseases of Animals Act, 1894"), § 52.

² Ward v. Hobbs, 1878, H. L.

³ Chanter v. Hopkins, 1838; Ollivant v. Bayley, 1843; recognised Parsons v. Sexton, 1847; Prideaux v. Bunnett, 1857; Hall v. Conder, 1857.

⁴ See "The Sale of Goods Act, 1893" (56 & 57 V. c. 71, § 14 (3)).

Bigge v. Parkinson, 1862; Brown v. Edgington, 1841; recognised in Sutton v. Temple, 1849; Mallan v. Radloff, 1864.

⁵ Randall v. Newson, 1877, C. A.

⁶ Shepherd v. Pybus, 1842; Sutton v. Temple, 1849 (Parke, B.).

⁷ Shiels v. Cannon, 1865 (Ir.); Jones v. Just, 1868.

⁸ Johnson v. Raylton, 1881 (Bramwell, L.J., diss.), C. A.

description true, "unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee."¹

§ 1181. After much discussion, it is now determined, however, that the law implies no warranty on a contract for the sale of a patent, either that the vendor was the true and first inventor within the Statute of James, or that the invention was either useful or new.²

§ 1182. The common law, too (as distinguished from the Employers' Liability Act), does not imply, from the ordinary relation of *master* and *domestic* or *menial servant*, any contract on the master's part to protect his servant against injury arising, either from the negligence of another servant, or from the defective condition of the master's property, unless it can be shown, either that the personal negligence or other misconduct of the master caused, or at least materially contributed to, the accident,³ or that the master knew of the danger while the servant did not.⁴ This doctrine is still applicable to the masters of domestic or menial servants. But the liability of most employers, other than those of domestic or menial servants, for personal injuries suffered by workmen in their service, has been altered by the Employers' Liability Act.⁵ The first three sections of that statute are the most important, but are too long to insert in this work. It should, however, be noted, 1st, that the Act does not apply, either to domestic servants or to seamen; 2nd, that "employer," as used in it, "includes a body of persons corporate or unincorporate;" and, 3rd, that the expression "workman," includes a railway servant, and any person of any age, who,—being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or *otherwise engaged in manual labour*,—has entered into or works under a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service, or a con-

¹ 50 & 51 V. c. 28, § 17.

² *Hall v. Conder*, 1857; *Smith v. Neale*, 1857; *Notor v. Brooks*, 1861; *Trotman v. Wood*, 1864.

³ *Priestley v. Fowler*, 1837; *Seymour v. Maddox*, 1851.

⁴ *Griffith v. London, &c. Docks Co.*, 1884, C. A.

⁵ 43 & 44 V. c. 42, continued till 31st Dec. 1895, by 57 & 58 V. c. 48 ("The Expiring Laws Continuance Act, 1894").

tract personally to execute any work or labour.¹ In consequence of this last definition, the Act does not apply to an omnibus conductor,² the driver of a tramcar,³ nor to a grocer's assistant.⁴

§ 1182A. The law, again, as regards seamen and sea apprentices, is governed by "The Merchant Shipping Act, 1894,"⁵ which enacts that, "(1) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: (2) Nothing in this section (a) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable; or (b) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession." The above section apparently makes the burthen of proof of unseaworthiness rest on the ship-owner, and obliges him to show that he has used "all reasonable means to insure the seaworthiness of the ship."

§ 1183. To return to the subject of warranties annexed by the law to certain contracts. The law implies a warranty by every artisan, artist, or presumably skilled labourer who enters into an engagement with an employer to work as such, that he possesses skill reasonably competent to the task he undertakes; as in the case of, e.g., an apothecary, a surveyor, a watchmaker, a cook, an auctioneer,⁶ or a solicitor, employed for reward. No express

¹ See 38 & 39 V. c. 90 ("The Employers and Workmen Act, 1875"), § 10; and 43 & 44 V. c. 42 ("The Employers' Liability Act, 1880"), § 8.

² *Morgan v. Lond. Gen. Omnibus Co.*, 1884, C. A.

³ *Cook v. North Metropolitan Tramways Co.*, 1887.

⁴ *Bound v. Lawrence*, 1892, C. A.

⁵ 57 & 58 V. c. 60, § 458.

⁶ *Kavanagh v. Cuthbert*, 1874-5, (Ir.).

promise or representation is necessary, for the public profession of an art is in itself a representation and undertaking to all the world that the professor possesses the requisite ability and knowledge.¹ If, therefore, the party employed proves incompetent, he may, though engaged for a term, be immediately discharged,² and his employer may also proceed against him for any loss occasioned by his ignorance or incapacity.³

§ 1184. The law, too, annexes as an incident to every contract to perform personal services,—as, for instance, to a covenant by an apprentice to serve his master for a certain period,—however absolute and unconditional may be the terms employed, a condition that the contractor shall be excused from the performance of his contract in the event of his becoming disabled by the act of God, as by death or permanent illness, from doing what he has undertaken to do.⁴ Thus, unless there be an express stipulation to the contrary, the death of the master terminates the service of a farm-bailiff.⁵ Consequently, inability from illness to perform it, discharges an undertaking by an author to write a book, by an artist to paint a picture within a certain time, or by a musician to play at a concert.⁶

§ 1185. Again, the law implies a warranty by a man who makes a contract as agent for another that he has authority to bind his principal. Therefore, if the agent turn out to have really no such authority as he has assumed to possess, or if he has made any misrepresentation in point of fact, as distinguished from a mere mistake in point of law,⁷ he may be sued for the damages necessarily occasioned by this breach of warranty, though he may have acted *bonâ fide*.⁸ Two directors of a company who had informed its bankers that “the manager” had authority to draw cheques upon the company’s account, were, on this principle, held,

¹ *Harmer v. Cornelius*, 1858 (Willes, J.).

² *Id.*

³ *Jenkins v. Betham*, 1854.

⁴ *Boast v. Firth*, 1868.

⁵ *Farrow v. Wilson*, 1869.

⁶ *Robinson v. Davison*, 1871.

⁷ *Beattie v. Ld. Ebury*, 1872, C. A. (Mellish, L.J.); *Rashdall v. Ford*,

1866; *Holman v. Pullin*, 1884 (Williams, J.).

⁸ *West London Com. Bk. v. Kitson*, 1884, C. A.; *Collen v. Wright*, 1857; *Richardson v. Williamson*, 1871; *Weeks v. Propert*, 1873; *Randell v. Trimen*, 1856; *Simons v. Patchett*, 1857. See *Worthington v. Sudlow*, 1862; *Maxwell v. Parnell*, 1866-67 (Ir.).

C. IV.] USAGE MUST NOT BE REPUGNANT TO CONTRACT.

when it appeared that there in fact was no such authority, to be themselves personally liable for advances made on cheques so drawn.¹

§ 1186. So, too, the law implies from the deposit of goods as security for the repayment of a loan on a certain day, a power on the pawnee's part to sell the goods in default of payment at the period stipulated.² This doctrine, however, does not apply where a man holds another person's goods on a simple *lien*. A *lien*, unlike a *pledge*, gives only a right of retention;³ and if goods the subject of a lien be sold (even to meet current expenses) the lien,—except in the case of an innkeeper who now enjoys to a limited extent a statutable right of sale,⁴—is thereby destroyed.⁵

§ 1187. Wherever it is sought to receive evidence of custom to annex an incident to a written contract, however, such evidence must not be *repugnant to or inconsistent with* the contract. Otherwise it would not go to interpret and explain, but to contradict, what is written.⁶ To create an inconsistency between the written agreement and the custom, it is not necessary that the former should *in express terms* exclude the latter; but if it can clearly be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by the custom, no evidence respecting it can be received.⁷ For instance, where a lease contains express stipulations as to ploughing, sowing, and manuring on leaving, and as to the payments the lessee is to then receive, evidence as to what, by the custom of the country, are the rights of the parties as to sowing, ploughing, and manuring on quitting, and as to the payments to which the lessee would usually be entitled, could not be received, because the principle, "*expressum facit cessare tacitum*" applies, and the language of the lease is deemed to exhaustively contain the stipulations of the parties on these subjects.⁸

¹ *Cherry v. Colonial Bk. of Australasia*, 1869, P. C. See *Beattie v. Ld. Ebury*, 1875, H. L.

² *Pigot v. Cubley*, 1864; *Johnson v. Stear*, 1863; *Pothonier v. Dawson*, 1816 (Gibbs, C.J.).

³ See *Donald v. Suckling*, 1866; *Halliday v. Holgate*, 1868.

⁴ 41 & 42 V. c. 38 ("The Innkeepers Act, 1878").

⁵ *Mulliner v. Florence*, 1878, C. A.

⁶ *Holding v. Pigott*, 1831; *Clarke v. Roystone*, 1845; *Yates v. Pym*, 1816; *Trueman v. Loder*, 1840; *Muncey v. Dennis*, 1856; *Suse v. Pompe*, 1860. See *Buckle v. Knoop*, 1867.

⁷ *Hutton v. Warren*, 1836 (Parke, B.). See *Clarke v. Roystone*, 1845.

⁸ *Hutton v. Warren*, 1836; *Webb v. Plummer*, 1819.

§ 1188. To constitute a custom or usage of trade or business, admissible in evidence to explain the terms of a written instrument, it, unlike a common law custom, need not have existed from time *immemorial*, or even have been established for a considerable period, nor be *uniform*, or capable of being defined with precision and accuracy.¹ Thus, “the custom of the country” with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie.² The general usage of trade may, too, be imported into a contract, though proof has been given of exceptions to such usage.³ Parties connected with a trade will also be presumed to have contracted with a reference to all usages which since its existence have prevailed in such trade, although that particular branch of it has been only established for a year or two.⁴ It is, however, the *fact* of a general usage or practice prevailing in the particular trade or business, and not the mere opinion of the witnesses, which is admissible in evidence: and unless the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight.⁵

§ 1189. Whenever evidence of usage is adduced, whether in order to explain the technical language of an instrument, or to annex incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between the parties.⁶ Indeed, “a party may properly . . . anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out.”⁷

¹ *Juggomohun v. Manickchund*, 1859, P. C. (Sir J. Coleridge).

² *Legh v. Hewitt*, 1803 (Ld. Ellenborough); *Dalby v. Hirst*, 1819. See ante, § 318.

³ *Vallance v. Dewar*, 1808 (Ld. Ellenborough).

⁴ *Noble v. Kennoway*, 1780 (Ld. Mansfield); *Robertson v. Jackson*, 1845.

⁵ *Lewis v. Marshall*, 1844 (Tindal, C.J.). Formerly, in America, a custom could not be established by merely the evidence of a single witness; but it is now settled in that

country that the fact that there is only a single witness to an alleged contract goes only to his credibility with the jury, and not to his competency in point of law: *Jones v. Hoey*, 1880 (Am.); *Robinson v. U. S.*, 1871 (Am.); *Vail v. Rice*, 1851 (Am.); *Greenleaf*, 15th edit., 1892, p. 355.

⁶ *Bourne v. Gatcliffe*, 1841 (Alderson, B.). See, also, *Bottomley v. Forbes*, 1838 (Tindal, C.J.); *Fawkes v. Lamb*, 1862.

⁷ *Bourne v. Gatcliffe*, 1844 (Ld. Brougham), H. L.

§ 1190. Much injustice is, it is feared, occasioned by a lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it never contemplated by the parties themselves, and utterly at variance with their real intentions. In this view some of the highest legal authorities both in England and America concur. The judges of the old Court of Exchequer once so said,¹ and the same opinion was expressed more than once by the old Court of Queen's Bench.²

§ 1191. Moreover, the expediency of the rule itself was questioned in a judgment of Lord Denman in the last-named court.³

§ 1192. In America, the late Story, J., too, expressed similar views.⁴

§ 1193. Not only, however, is evidence of usage, strictly so called, admissible under the rule laid down⁵ and discussed⁶ above, but it further almost seems that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses, present at the time of its being made, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms.⁷ Even conversations between the parties when the contract was being made, have, on one or two occasions, been received, in proof of the sense which they attached to the ambiguous expressions.⁸ The principle of these cases is, however, not very clear, and no great weight should be attached to them.⁹

§ 1194. Some time ago¹⁰ it was pointed out that evidence in explanation of written instruments might be received, first, if such instrument was doubtful, or, secondly, where the person or things to which it relates require identification. The first branch of this

¹ See *Hutton v. Warren*, 1836. See, also, *Anderson v. Pitcher*, 1800 (Ld. Eldon).

² *Johnston v. Usborne*, 1840; *Trueman v. Loder*, 1840.

³ *Trueman v. Loder*, 1840.

⁴ *The Schooner Reeside*, 1837 (Am.).

⁵ *Supra*, § 1168.

⁶ *Supra*, §§ 1168—89.

⁷ *Sweet v. Lee*, 1841; as, for instance, to show who are meant by "S. and others" in an agreement: *Herring v. Boston Iron Co.*, 1854 (Am.).

⁸ *Birch v. Depeyster*, 1816 (Gibbs, C. J.); *Gray v. Harper*, 1841 (Am.); *Selden v. Williams*, 1839 (Am.).

⁹ See *Smith v. Jeffries*, 1846.

¹⁰ § 1158.

rule has now been fully dealt with. Passing to the second, it may be said broadly that *extrinsic evidence* of every *material fact*, which will enable the court to ascertain the *nature and qualities* of an instrument, must always be received.¹ To discover the intention of the writer of an instrument, as evidenced by the words he has used, is always the object; and the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter.² With this view, extrinsic evidence of all the circumstances surrounding the author of the instrument is admissible.³ In the simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed as "Blackacre," parol evidence must be admitted to show what property is known by that name;⁴ and if a testator devise a house or a farm described as purchased of A., or in the occupation of B., or called "Cleeve Court," it must be shown by extrinsic evidence what house or farm was purchased of A., or was in B.'s occupation, or was called "Cleeve Court," before it can be shown what is devised.⁵

§ 1195. To put an instance somewhat more complex; if the terms be vague and general, or have divers meanings, parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons,⁶ or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, a court which has to determine whether a bequest of *stock* is specific or pecuniary, will not only look to the context

¹ *Grahame v. Grahame*, 1887 (Ir.). Accordingly, parol evidence may be admitted to show that a mortgage was only intended to stand as security for certain moneys. See *Trench v. Doran*, 1887 (Ir.); *Doe v. Hiscocks*, 1839 (Ld. Abinger); *Shore v. Wilson*, 1842 (Parke, B.), H. L.; *Wigr. Wills*, 65; *Doe v. Martin*, 1833 (Parke, J.); *R. v. Wooldale*, 1844 (Coleridge, J.). See *Macdonald v. Longbottom*, 1860; *Mumford v. Gething*, 1859; *Chambers v. Kelly*, 1873 (Ir.); *McCollin v. Gilpin*, 1881.

² *Shore v. Wilson*, 1842 (Parke, B.), H. L.; *Doe v. Martin*, 1833 (id.); *Guy v. Sharp*, 1833 (Ld. Brougham); *Wigr. Wills*, 88.

³ *Sweet v. Lee*, 1841 (Tindal, C.J.); *Att.-Gen. v. Drummond*, 1842 (Sugden, C.); *Drummond v. Att.-Gen.*, 1849 (Ir.) (Ld. Brougham), H. L.; *Att.-Gen. v. Earl of Powis*, 1853 (Wood, V.-C.); *King's Coll. Hospital v. Wheildon*, 1854; *Blundell v. Gladstone*, 1843; *Simpson v. Margitson*, 1847 (Ld. Denman); *Roden v. London Small Arms Co.*, 1877.

⁴ *Ricketts v. Turquand*, 1848, H. L.

⁵ *Sanford v. Raikes*, 1816 (Sir W. Grant); *Clayton v. Ld. Nugent*, 1844 (Rolfe, B.); *Castle v. Fox*, 1871.

⁶ See *Grant v. Grant*, 1870.

of the will, and the terms of the gift, as compared with those of the other bequests, but will receive evidence of the state of the testator's funded property.¹ Again, where an assignment by deed stated that the particulars were set forth in an inventory annexed, the fact of no inventory being found does not invalidate the deed, but extrinsic evidence is admissible to identify the chattels;² where a will directs that all moneys advanced to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, not only is extrinsic evidence of the nature and amount of the advances admissible, but so is even an unattested document, drawn up by the testator after the date of the will, with the apparent view of furnishing a guide to his trustees;³ and parol evidence is even admissible to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly-attested codicil, which refers in general terms to the testator's "last will."⁴

§ 1196. A codicil of the distinguished sculptor, Nollekens, occasioned a dispute arising from this doctrine.⁵ "In case of my death all the marble in the yard, the tools in the shop, bankers, *mod* tools for carving," &c., "shall be the property of Alex. Goblet." The legatee contended that "*mod*" meant "models;" the executor urged that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand the legatee was proved to have been in the testator's service for thirty years, and highly esteemed by him as one of his best workmen; while statuary proved that no such tools were known as modelling tools for carving, but that "*mod*" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in

¹ Att.-Gen. v. Grote, 1827 (Ld. Eldon); Boys v. Williams, 1831 (Ld. Brougham); Horwood v. Griffith, 1854.

² England v. Downs, 1840. But see now "The Bills of Sale Act, 1882" (45 & 46 V. c. 43), § 4.

³ Whateley v. Spooner, 1857. But see Smith v. Conder, 1878 (Hall, V.-C.).

⁴ Allen v. Maddock, 1858, P. C.; In re Almosnino, 1860; ante, § 1061.

⁵ Goblet v. Beechey, 1829.

the codicil were of trifling value; and he further shewed that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. On this evidence "mod" was decided by a V.-C. to mean "models."¹ In another case, a testator bequeathed to his two children the several sums of "i.x.x." and "o.x.x." These marks were allowed to be explained by extrinsic evidence, that the deceased had, in his business of a jeweller, used them respectively as denoting 100*l.* and 200*l.*²

§ 1197. Again, it is obvious, that unless it were first made acquainted with the circumstances surrounding a testator, a court could not with safety undertake to construe his will.³ Thus, in many testamentary dispositions, one construction would be given to particular words, if children were living at the time the will was executed; and another construction, if no child was alive at that period. If a man were to make an ambiguous settlement for his children, it might be impossible to solve the doubt, until evidence had been adduced respecting the state of the settlor's family, and the circumstances in which he was placed in relation to the property dealt with.⁴ Parol evidence will, too, always be admissible to shew what passed as parcel thereof on a conveyance or devise of an estate, a house, a mill, a factory, or a farm, eo nomine, by proof of the situation and limits of the property, the manner in which it was acquired, or occupied, and the like.⁵ Parol evidence of the circumstances under which it was given, and to explain the ambiguity, will also be received if the language of a guarantee leaves it doubtful whether the consideration mentioned therein be a *past* or *present* consideration, and, consequently, whether the instrument be invalid or valid,⁶ unless, indeed, the court, without

¹ The case was ultimately decided not to turn upon the admissibility of this evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much obscurity to justify its operating as a revocation of the prior bequest: *Goblet v. Beechey*, 1831.

² *Kell v. Charmer*, 1856.

³ *Sugden, C.*, in *Att.-Gen. v. Drummond*, 1842 (*Ir.*).

⁴ *Id.*

⁵ *Doe v. Martin*, 1833 (*Parke, J.*); *Doe v. Burt*, 1787 (*Buller, J.*); *Castle v. Fox*, 1871; *Webb v. Byng*, 1855; *Doe v. Ld. Jersey*, 1825, *H. L.*; *Okeden v. Clifden*, 1826; *Ropps v. Barker*, 1826 (*Am.*); *Farrar v. Stackpole*, 1829 (*Am.*).

⁶ *Goldshede v. Swan*, 1847, and cases there cited; *Edwards v. Jevons*, 1849; *Colbourn v. Dawson*, 1851; *Bainbridge v. Wade*, 1850; *Hoad v. Grace*, 1862; *Wood v. Priestner*, 1866; *Heffield v. Meadows*, 1869.

the aid of any extrinsic proof, in the first instance adopt that construction which supports the validity of the instrument, and casts upon the party objecting to the guarantee the burthen of producing evidence to show that it was void.¹

§ 1198. It often happens that, in consequence of the surrounding circumstances being proved, the courts give an instrument, thus relatively considered, a very different interpretation from that which it would have received, had it been considered in the abstract. The effect of proof of surrounding circumstances is, however, not to vary the language employed, but merely to explain the sense in which the writer understood it. For example, a contract or other instrument, susceptible of both meanings, but which *primâ facie* seems to have created a joint-tenancy, may be construed as having simply established a tenancy in common, if it can be shown, not indeed by parol testimony of intention, but by evidence of the acts and dealings of the parties, and of the surrounding circumstances, that the latter construction is that which the instrument must have been originally intended to bear;² verbal evidence that a cellar under the yard was at the time of the lease in the occupation of a third party may be admitted to show that a lease which included a yard described by the metes and bounds, could not have been intended to pass such cellar;³ a devise of all testator's "lands in the parish of Doynton" passed a farm, which subsequently turned out to be partly in another parish, but which was at the date of the will generally reputed to be wholly in Doynton;⁴ and though the estate at Chelsea of a conusor of a fine levied for twenty acres of land and twelve messuages in Chelsea, was under twenty acres, verbal evidence that he had nineteen houses on it was admitted; while since read in connexion with these facts, the fine was ambiguous, further verbal evidence was allowed to show that a particular part of the property was intended to be included in the fine.⁵

¹ *Steele v. Howe*, 1849; *Broom v. Batchelor*, 1856. See *Mare v. Charles*, 1856; and, also, 19 & 20 V. c. 97 ("The Mercantile Law Amendment Act, 1856"), § 3, cited ante, § 1030.

² *Harrison v. Barton*, 1861 (Wood, V.-C.).

³ 2 Poth. Obl. 185; *Doe v. Burt*, 1787.

⁴ *Anstee v. Nelms*, 1853.

⁵ *Doe v. Wilford*, 1824; *Denn v. Wilford*, 1826.

§ 1199. The same principle was applied where an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and an illegitimate daughter, named Elizabeth. To rebut the claim of the illegitimate daughter Elizabeth, extrinsic evidence was admitted showing that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who had been born in the order stated in the will; that, though this daughter had died several years before the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances a jury were held to have rightly decided that the illegitimate Elizabeth was not entitled.¹

§ 1200. Again, where an order of removal has been quashed generally by Sessions, on the trial of an appeal against a subsequent order of removal, the removing parish may show by parol evidence the state of things when the first order was quashed, and that the Sessions, in quashing it, intended to pronounce no decision on the merits of the settlement.² *Primâ facie*, indeed, an order of Sessions quashing an order of removal is evidence that the pauper was not settled in the appellant parish.³ But the respondents may prove the particular ground on which the decision rested.²

§ 1201. Moreover, although evidence of all the circumstances surrounding the author of a written instrument, will be received to ascertain his intentions, yet those intentions must ultimately be determined by the *language* of the instrument, as explained by the extrinsic evidence; and no proof (however conclusive), can be admitted, with a view of setting up an intention inconsistent with the known meaning of the writing itself.⁴ The duty of the court in all cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used.⁵

¹ *Doe v. Beynon*, 1840; Phillips *v. Barker*, 1854. See, also, *supra*, § 1165.

² *R. v. Wick St. Lawrence*, 1833; *R. v. Wheelock*, 1826; *R. v. Peranzabuloe*, 1844 (Patteson, J.); *R. v. Flintshire*, 1844.

³ *R. v. Wick St. Lawrence*, 1833 (Parke, J.); *R. v. Yeoveley*, 1838 (Ld. Denman).

⁴ *Newenham v. Smith*, 1859 (Ir.) (Pigot, C.B.).

⁵ *Doe v. Gwillim*, 1833 (Parke, J.); *Doe v. Martin*, 1833 (*id.*); *Shore v.*

C. IV.] EVIDENCE OF INTENTION, WHEN INADMISSIBLE.

The duty is merely that of interpretation; that is, to find out the true sense of the written words, *as the parties used them*; and of construction, that is, when the true sense is ascertained, *to subject the instrument to the established rules of law*.¹

§ 1202. Therefore, in no case is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer, except² where the description in the document would equally apply to any one of two or more subjects,³ or where the object is to rebut an equity.⁴ In all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention.⁵

§ 1203. For instance,⁶ parol evidence to show what persons a testator meant to include or exclude in employing the words "relations," has repeatedly been rejected;⁷ neither can it be received to show what articles he intended to give by the word "plate,"⁸ or what property he thought he devised by the expression "lands out of settlement,"⁹ and the like.¹⁰ In

Wilson, 1842 (Coleridge, J., Parke, B., Tindal, C.J.), H. L.; Beaumont v. Field, 1818 (Abbott, C.J.); Richardson v. Watson, 1833 (Parke, J.); Rickman v. Carstairs, 1833 (Ld. Denman).

¹ See Leiber's Legal and Polit. Hermeneutics, c. 1, § 8, and c. 3, §§ 2, 3; Doct. & Stu. 39, c. 24.

² As to these exceptions, see further, post, §§ 1206, 1227.

³ Shore v. Wilson, 1842 (Parke, B.) H. L.

⁴ See post, §§ 1227—1230.

⁵ Shore v. Wilson, 1842 (Coleridge, J., Parke, B., Tindal, C.J.), H. L. Re Peel, 1870, appears to unprofessionally men a reduction of this rule to an absurdity.

⁶ For other instances, see ante, §§ 1155, 1156.

⁷ Goodinge v. Goodinge, 1749; Edge v. Salisbury, 1749; Green v. Howard, 1779. See Sullivan v. Sullivan, 1870 (Ir.), where the words were "my dearly beloved."

⁸ Nicholls v. Osborn, 1727; Kelly v. Powlet, 1763.

⁹ Strode v. Russel, 1708.

¹⁰ See other instances collected in Wigr. Wills, 99—105. See, also, Doe v. Hubbard, 1850; Horwood v. Griffith, 1854; Hicks v. Sallitt, 1854; Millard v. Bailey, 1866 (Wood, V.-C.). In Knight v. Knight, 1861, Stuart, V.-C., appears to have utterly ignored this rule, holding that extrinsic evidence was admissible to show that, under the words "ready money," a testator meant that shares in an insurance company should pass. Sed qu.

all these cases, as the legal signification of the language used was plain, it matters not what the testator intended; the sole question being, *non quod voluit, sed quod dixit*.¹ If this were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary its plain language.²

§ 1203A. Declarations of intention may, however, be received in evidence when the question does not turn on the *meaning* of the language employed; consequently, if a will be lost, evidence of the testator's declarations of intention will be admissible in proof of its contents;³ and if a question arise with regard to the constituent parts of an existing will, similar statements, whether oral or written, and whether made before or after it was signed, may be given in evidence to show what was or was not a part of the instrument at the time of its execution.⁴

§ 1204. The general rule has, moreover, been somewhat relaxed in order to facilitate the interpretation of *ancient* writings. For if an instrument be old, and its meaning doubtful, the *acts* of the author (which are only modes of expressing intention more weighty than words) may be given in evidence in aid of its construction. Tindal, L. C. J., once expressly declared, that to ascertain the sense of an old charity grant, evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed," is certainly admissible.⁵ Proof of the application of the funds of an ancient charity by the original founder, and first trustee, is, indeed, strong evidence of intention,

¹ *Shore v. Wilson*, 1842 (Parke, B.) H. L.

² *Id.* (Tindal, C.J.).

³ *Sugden v. Ld. St. Leonards*, 1876.

⁴ *Gould v. Lakes*, 1880; *Re Ball*, 1890 (Ir.); *Sugden v. Ld. St. Leonards*, 1876.

⁵ *Shore v. Wilson*, 1842, H. L. See, also, *Att.-Gen. v. Sidney Sussex Coll.*, 1869, C. A.; *Att.-Gen. v. May. of Bristol*, 1820 (Ld. Eldon). See 7 & 8 V. c. 45 ("The Nonconformist Chapels Act, 1844"), § 2, cited ante, § 75.

and may be so regarded by the court in construing an old grant;¹ and, while evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant, cannot be received, evidence may be given of *acts* of the founder in relation to the charity.² Lord St. Leonards, too, once observed, "Tell me what you have done under such a deed, and I will tell you what that deed means."³

§ 1205. Charities, however, possess no peculiarity which warrants the adoption of a special rule of evidence with respect to them. Consequently, *all* ancient instruments of every description may, *when they contain ambiguous language*, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or, in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed.⁴ For instance, the contemporaneous acts of occupiers of land have been admitted in evidence to explain the meaning of an ambiguous award under an old enclosure Act;⁵ evidence that the tenants had for a long series of years enjoyed the land itself has been received on a question as to whether the soil, or merely the herbage, passed under the term "*pastura*" contained in an ancient admission as entered on the court-rolls of a manor;⁶ the by-laws of a corporation may be taken as an exposition of their charter;⁷ and evidence of contemporaneous, or even of constant modern,⁸ usage will be admissible, for the purpose of ascertaining the meaning and effect of an ancient grant or charter from the Crown,⁹ or of any private

¹ Att.-Gen. *v.* Brazenose College, 1834, H. L.

² Drummond *v.* Att.-Gen., 1848, H. L.

³ Att.-Gen. *v.* Drummond, 1842 (Ir.).

⁴ Weld *v.* Hornby, 1806 (Ld. Ellenborough); Waterpark *v.* Fennell, 1859, H. L.; Donegall *v.* Templemore, 1858 (Ir.); D. of Devonshire *v.* Neill, 1877 (Ir.) (Palles, C.B.); Att.-Gen. *v.* Parker, 1747 (Ld. Hardwicke); R. *v.* Dulwich College, 1851; Att.-Gen. *v.* Murdoch, 1852. In Att.-Gen. *v.* St. Cross Hospital, 1853, Sir J. Romilly, M.R., held that no presumption could be made against the clear ostensible purpose of the founda-

tion, though it were supported by a usage of 150 years. See Att.-Gen. *v.* Clapham, 1854.

⁵ Wadley *v.* Baylis, 1814; recognised (Cresswell, J.) in Doe *v.* Bevis, 1849; Att.-Gen. *v.* Boston, 1847.

⁶ Doe *v.* Bevis, 1849; Stammers *v.* Dixon, 1806.

⁷ Davis *v.* Waddington, 1844 (Tindal, C.J.).

⁸ Chad *v.* Tilsed, 1821; Doe *v.* Bevis, 1849; D. of Beaufort *v.* May. of Swansea, 1849; Master Pilots, &c. of Newcastle *v.* Bradley, 1851; Shephard *v.* Payne, 1863, C. A.

⁹ May. of London *v.* Long, 1807 (Ld. Ellenborough); R. *v.* Varlo, 1775; Blankley *v.* Winstanley, 1789;

deed, or other instrument, of remote antiquity.¹ Even when an old statute is ambiguous, the maxim, *optimus interpres rerum usus*, will apply.²

§ 1206. As before mentioned,³ moreover, the *declarations* of the writer of an instrument will *be receivable in evidence* in two cases. One of these arises *where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things.*

§ 1207. To use the words of Lord Abinger, “there is *but one case*,⁴ in which . . . this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator’s words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things,⁵ or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls ‘an equivocation,’ that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity;⁶ for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator’s intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to

Bradley v. Pilots of Newcastle, 1853; Jenkins v. Harvey, 1835; Brune v. Thompson, 1843.

¹ Withnell v. Gartham, 1795 (Ld. Kenyon); Weld v. Hornby, 1806 (Ld. Ellenborough); Duke of Beaufort v. May, of Swansea, 1849; Sadlier v. Biggs, 1853, H. L.; Waterpark v. Fennell, 1859, H. L.

² R. v. Scott, 1790 (Ld. Kenyon); Sheppard v. Gosnold, 1673; R. v.

Abp. of Canterbury, 1848 (Coleridge and Patteson, JJ.); Montrose Peer., 1853, H. L.

³ Ante, § 1202. See, also, Charter v. Charter, 1874, H. L.

⁴ As to rebutting an equity, see, however, §§ 1227—1230.

⁵ See Harman v. Gurner, 1866.

⁶ See Douglas v. Fellows, 1853 (Wood, V.-C.).

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appear by the writing, explained by circumstances, there is no will.”¹

§ 1208. The rule thus laid down has been followed in various cases. Thus, on the one hand, where there is a devise to a relative described as being of a certain degree of relationship, if there exist a legitimate relation of this degree of relationship, parol evidence is not admissible to show that an *illegitimate* relation whose reputed relationship is of the same degree, was the person really intended.² Further, on a gift by will to “my niece, E. W.” if neither the testator nor his wife possess a niece, though it may be shown that a niece or grandniece of the wife was meant—and such a person can claim the gift as a “niece”³—extrinsic evidence is not admissible to show that another but illegitimate grandniece was meant.⁴ Again, on a gift to the “children” of a donee who has two families, all his children will take, and extrinsic evidence cannot be received to show that only the children of one family were meant, for the word “children” is not ambiguous.⁵ On the other hand, where a testator devised one house “to George Gord, the son of George Gord,” another “to George Gord, the son of John Gord,” and a third after the expiration of certain life estates, “to George Gord, the son of Gord,” evidence of his declarations was admitted to show, that the person meant to be designated by the last description was George the son of *George* Gord;⁶ where a devise is expressed to be in favour of a person who is named and described, but there are two persons, each of whom possesses the name and description, parol evidence of the testator’s intention or declarations is admissible to resolve this latent ambiguity.⁷

§ 1209. Where declarations of intention are receivable in evidence, their admissibility appears not to depend upon the *time* when they were made. Certainly, *contemporaneous* declarations will, *cæteris paribus*, be entitled to greater weight than those made

¹ *Doe v. Hiscocks*, 1839.

² See *Dorin v. Dorin*, 1875, H. L.; *In re Taylor*, 1887; *Wells v. Wells*, 1874; *In re Brown*, 1889.

³ *In re Fish*, *Ingham v. Rayner*, 1894.

⁴ *Sherratt v. Montford*, 1873.

⁵ *Andrews v. Andrews*, 1884-85 (Ir.); *Dorin v. Dorin*, 1875, *supra*.

⁶ *Doe v. Needs*, 1836; *Doe v. Morgan*, 1832.

⁷ *Doe v. Allen*, 1840; *Fleming v. Fleming*, 1862; *Jones v. Newman*, 1750-51; explained in *Doe v. Hiscocks*, 1839; *Phelan v. Slattery*, 1887 (Ir.); *Bennett v. Marshall*, 1856; *Re O'Reilly*, 1874. See *Webber v. Corbett*, 1874.

before or after the execution; but in point of law no distinction can be drawn between them,¹ unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by an instrument, were simply to refer to what he intended to do, or wished to be done, at the time of speaking.² Neither will the *admissibility* of declarations rest on the manner in which they were made, or on the occasions which called them forth. Whether they consist of statements gravely made to interested parties, or of instructions to professional men, or of light conversations, or of angry answers to impertinent inquiries by strangers, they will be alike received in evidence, though the *credit* due to them will of course vary materially according to the time and circumstances.³ They may of course consist of letters; for example, letters in which a deceased insured expressed an intention of going to a certain place where a dead body, the identity of which is questioned, has been found.⁴

§ 1210. Moreover, though declarations of intention are inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, mere *collateral statements* made by the author of the instrument respecting the persons or things mentioned therein are not excluded. For instance, where a testator has habitually called certain persons or things by *peculiar names*, by which they were not commonly known, these names occurring in his will, could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language,⁵ and the habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.⁶ Accordingly, under a devise in trust for "the second son of *Edmond Weld*, of *Lulworth*, Esq.," parol evidence was admitted to show that the testator had on several occasions, even after correction, called the possessor of *Lulworth* "*Edmond*,"⁷ though his real name was "*Joseph*."

¹ *Doe v. Allen*, 1840 (Ld. Denman), as to *subsequent* declarations; *Doe v. Hiscocks*, 1839 (Ld. Abinger), as to *previous* declarations. See, *contra*, *Thomas v. Thomas*, 1796; *Strode v. Russell*, 1708.

² *Whitaker v. Tatham*, 1831.

³ *Trimmer v. Bayne*, 1802 (Ld.

Eldon).

⁴ *Mutual Life, &c. v. Hillman*, 1892 (Am.).

⁵ As to which, see *supra*, § 1196.

⁶ *Doe v. Hiscocks*, 1839 (Ld. Abinger). See, also, *Doe v. Hubbard*, 1850 (Erle, J.).

⁷ *Ld. Camoys v. Blundell*, 1848,

§ 1211. Again,¹ where a testatrix of great age bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, 200*l.* each," evidence was received (and acted upon) that no "Mrs. Bowden" answering the description in the bequest, had for years lived at Hammersmith; that the testatrix had, years before, been intimately acquainted with Bowdens; that a certain Mrs. Washbourne was the daughter of a Rev. Mr. Bowden; and that testatrix had been in the habit of calling her by her maiden name of Bowden, and often, after being reminded of the mistake, acknowledged that she had confounded the two names. Similarly, under a bequest to "Mrs. G.," parol evidence was admitted to show that the testator had been in the habit of calling a Mrs. Gregg, "Mrs. G.;"² while (and perhaps this case³ carries this doctrine to its extreme limit) under a gift of a legacy to Catherine Earnley, proof was received (and acted upon) that no such person as Catherine Earnley was known, and that the testator usually called one *Gertrude* Yardley "Gatty," which might easily have been mistaken by the scrivener who drew the will for "Katy."

§ 1212. This rule, by which the admissibility of declarations of intention is governed, largely turns upon the distinction between a *patent* and a *latent* ambiguity, and will be better understood by reference to cases where evidence of such declarations has been rejected. Says Lord Bacon, "There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with

H. L. See, also, *Mostyn v. Mostyn*, 1854, H. L.

¹ *Lee v. Pain*, 1844. See, also, *R. v. Wooldale*, 1845.

² *Abbott v. Massie*, 1796; explained (Rolfe, B.) in *Clayton v. Ld. Nugent*, 1844. See, also, *In the goods of François de Rosaz*, 1877.

³ *Beaumont v. Fell*, 1723. Declarations of the testator were here admitted, but the propriety of receiving such evidence has been strongly questioned (*Ld. Abinger*) in *Doe v. Hiscocks*, 1839, and, as an authority of that, the case may be considered overruled.

matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F., and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was, that the party intended should pass."¹ He also remarks: "Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur."²

§ 1213. So far as patent ambiguities are concerned, Lord Bacon's exposition of the law is sufficiently precise; and there can be no doubt that when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded. For example, if a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will would, so far as regarded the residuary bequest, be inoperative and void; and on the same principle, where a testator purported to leave his property to persons designated by letters of the alphabet, his will stating at its end that the key to the initials was in his writing-desk on a card, it was held that (no card of as old a date as the will being found) a card which would have furnished a key, but was dated many years after the execution of the will, could only be regarded as a declaration of the testator, and that the case being one of patent ambiguity, this species of evidence could not be legally admitted.³

§ 1214. The law as to latent ambiguities is not so easily intelligible. To begin with, it must not be supposed that, because no ambiguity arises on the face of the instrument, *any* doubt which is occasioned by extrinsic evidence may be cleared up by having

¹ See Bacon's Law Tracts, 99, 100.

² Bacon's Maxims, Reg. 23.

³ Clayton v. Ld. Nugent, 1844.

See Kell v. Charmer, 1856, cited ante,

§ 1196; and see, also, Whateley v.

Spooner, 1857, cited ante, § 1195.

C. IV.] TWO CLAIMANTS PARTLY ANSWERING DESCRIPTION.

recourse to the declarations of the writer's intention. In many instances of strictly *latent* ambiguities evidence of declarations of intention would be inadmissible. Thus, a will, apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be "*uncertain*;" that is, not to describe persons or things to which it refers with *legal certainty*. For example, suppose a bequest to the *four* children of A., and it appears that A. had *six* children, two by a first marriage, and the remainder by a second. Evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, but proof of the testator's declarations of intention could not be received, so that the gift would be bad for uncertainty.¹

§ 1215. In the second place, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another*. Formerly the law attached somewhat greater weight to the *name* than to the *description* of the legatee, so that if there were nothing in the rest of the will, or in admissible evidence, to show who was meant, the person rightly named was allowed to take in preference to him who was only rightly described.² This doctrine seems to have been first promulgated by Lord Bacon,³ who embodied it in the maxim, "*Veritas nominis tollit errorem demonstrationis*." Thus, where a man had, in the lifetime of his wife, Mary, gone through the marriage ceremony with a reputed second wife, Caroline, with whom he had continued to reside up to the date of his decease, and by a will made shortly before his death devised certain property to "*his dear wife Caroline*," on the question whether the will designated the lawful wife who was wrongly, or the unlawful wife who was rightly, named, the court held Caroline to be entitled.⁴ The doctrine has, however, been very roughly handled

¹ *Doe v. Hiscocks*, 1839 (Ld. Abinger), questioning *Hampshire v. Peirce*, 1750; *Andrews v. Andrews*, 1884-85 (Ir.), *supra*, § 1208.

² *Ld. Camoys v. Blundell*, 1848, H. L. (Parke, B., pronouncing the opinion of the judges). But see *Drake v. Drake*, 1860, H. L.; and *Farrer*

v. St. Catherine's Coll., 1873 (Ld. Selborne, C.).

³ *Ld. Camoys v. Blundell*, 1848 (Ld. Brougham), H. L.

⁴ *Doe v. Rouse*, 1848; *Adams v. Jones*, 1852 (Turner, V.-C.); *Dilley v. Matthews*, 1863 (Wood, V.-C.).

by Lord Chancellor Campbell in the House of Lords;¹ and if it cannot at present be safely regarded as exploded,² still less, on the other hand, can it be recognised as an inflexible rule.³ In all such cases the context and the surrounding facts will be looked at closely, and the court will place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument. If it can then *clearly* ascertain from the language of the will⁴ which of two claimants was intended by the testator, it will award the legacy to the one so meant to be benefited,⁵ though the supposed maxim may chance to be contravened.⁶

§ 1216. A striking illustration of this last principle is afforded by a case⁷ where a testator devised an estate to his nephew for life, with remainder over to "*Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of Gillingham, single woman, who had formerly lived in his service,*" and it appeared that, at the date of the will, Elizabeth Abbott, the mother, was the wife of John Caddy, and had had only two children, namely, a *natural son* named John, born before his mother's marriage, shortly after she had left the testator's service, and of whom testator's nephew was the putative father, the other named Margaret, who was born four years subsequently to her leaving the service, and was a *legitimate daughter* by Caddy, and it further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to the date of the will; but no proof was given that he knew whether the natural child was a boy or a girl. It was held that the testator meant to provide for his nephew's natural child

¹ Drake v. Drake, 1860, H. L.

² See In re Plunkett's estate, 1861 (Ir.); Colclough v. Smyth, 1860 (Ir.); Garner v. Garner, 1860; Gillett v. Gane, 1870.

³ *Ld. Camoys v. Blundell*, 1848, H. L.; *Thomson v. Hempenstall*, 1849 (Dr. Lushington).

⁴ *Re Brake*, 1881.

⁵ *Garland v. Beverley*, 1878; In re Lyon's Trusts, 1879 (Hall, V.-C.).

⁶ *Doe v. Huthwaite*, 1820; explained (*Ld. Abinger*) in *Doe v. Hiscocks*, 1839; *Ld. Camoys v. Blundell*, 1848, H. L.; *Healy v. Healy*, 1875 (Ir.); *Charter v. Charter*,

1874, H. L.; In re Wolverton Mortgaged Estates, 1877 (Malins, V.-C.); In re Nunn's Will, 1875; In re Blayney's Trusts, 1875 (Ir.), where the doctrine was carried to its limit (*Sullivan, M.R.*); *Bernasconi v. Atkinson*, 1853; In re Bridget Feltham, 1855; *Hodgson v. Clarke*, 1860; *Re Gregory's Settlement and Wills*, 1865; *Re Noble's Trusts*, 1871 (Ir.); *Re Feltham's Trusts*, 1855; *Re Kilvert's Trusts*, 1871; *Dooley v. Mahon*, 1877 (Ir.).

⁷ *Ryall v. Hannam*, 1847. See, also, *Douglas v. Fellows*, 1853.

by his servant, Elizabeth Abbott, and that the mistake of the name and sex was not sufficient to defeat the devise.

§ 1217. In cases of this nature, however, the court cannot, it must be recollected, receive any *declarations* of the testator as to what he intended to do¹ by his will. Thus, in a leading case, a testator devised lands to his son, John Hiscocks, for life; and after his decease, to his grandson, "*John, the eldest son of the said John Hiscocks,*" it appearing that the testator's son had been twice married, and that by his first wife had had Simon, but that John was the eldest son of the second marriage; it was held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible for the purpose of showing which of these two grandsons was intended.² So, again, in the case cited below, upon the question whether a great-great-niece could take under the description of a "*niece,*" evidence was offered that the testator had had a niece named Elizabeth Stringer, to whom by a former will he had left a legacy; that this niece (who was grandmother to Elizabeth Stringer, the claimant) died in 1848; that, in 1850, the testator made a codicil, without allusion to the lapsed legacy; that in 1852 he instructed his solicitor to prepare a second (and inconsistent) codicil, on which occasion he again made no reference to Elizabeth Stringer's legacy; that his solicitor, having recommended that, in lieu of two inconsistent codicils, a new will should be made, and being ignorant of the death of Elizabeth Stringer, the niece, copied into the second will the bequest in her favour as it stood in the first will; and that the testator's memory was impaired by age, and his attention was not in any way directed to the legacy in question, which, beyond reasonable doubt, having thus been inserted by the solicitor through ignorance, was allowed to remain by the testator through forgetfulness. Assuming this evidence to be admissible, the claimant was *clearly* not the object of the testator's bounty. Such evidence, however, was rejected, first, by the Master of the Rolls,³ and next,

¹ Doe v. Hiscocks, 1839, where Ld. Abinger questions and overrules the contrary dicta of Ld. Kenyon and Lawrence, J., in Thomas v. Thomas, 1796.

² See, also, Drake v. Drake, 1860, H. L.; Douglas v. Fellows, 1853; Bernasconi v. Atkinson, 1853; Farrer v. St. Catherine's Coll., 1873 (Ld. Selborne, C.).

³ Stringer v. Gardiner, 1859.

by the full Court of Appeal,¹ as not being admissible to guide the court in the construction of the will, and Elizabeth Stringer, the claimant, was consequently held entitled to the property although she was a great-great-niece, not a "niece," and although her proper name was not "Elizabeth Stringer" but Elizabeth Jane Stringer.

§ 1218-19. In the third place,² the description may *not accurately specify* even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declarations cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative. If, after rejecting so much of the description as is false, the remainder will enable the court to ascertain with legal certainty the subject matter to which the instrument really applies, it will be allowed to take effect.³ The rule of the civil law, "*Falsa demonstratio non nocet, cum de corpore constat*," is followed in such cases.

§ 1220. The rule, which rejects erroneous descriptions, which are not substantially important, can, however, only be applied where enough remains to show the intent plainly. It is⁴ "clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It matters not which part of the description is placed first, and which last, in the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."⁵

§ 1221.⁶ Examples of the rule "*falsa demonstratio non nocet*," are furnished by its having been held that, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and

¹ Stringer v. Gardiner, 1860.

² For the two first cases, see *supra*, §§ 1214, 1215 et seq.

³ See Ford v. Batley, 1854; Coltman v. Gregory, 1871.

⁴ Doe v. Galloway, 1833 (Parke, J.). See, also, Doe v. Hubbard, 1850; Doe v. Carpenter, 1850.

⁵ Stukeley v. Butler, 1615.

⁶ Gr. Ev. § 301, in part.

now in the occupation of one S., lying " within certain specified abutments, " with all the houses thereto belonging, and which are now in the occupation of the said S.," a house lying within the abutments, though not in the occupation of S., would pass;¹ that by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," the whole farm passed, though it was not all in C.'s occupation;² that a devise of all the testator's *freehold* houses in Aldersgate-street, when in fact he had only leasehold houses there, was, in substance and effect, a devise of his houses in that street, the word *freehold* being rejected as surplusage;³ that if a landlord, having but one house in a street, describe it in a lease by a wrong number, and then let a tenant into possession under it, he cannot afterwards rely on the error, and contend that no interest passed; for the number is rejected as an immaterial part of the description;⁴ that where land was described in a patent as lying in the county of M., and further described by reference to natural monuments, on its appearing that the land described by the monuments was in the county of H., and not of M., that part of the description which related to the county must be rejected, since, said the court, the entire description in the patent being taken, and the identity of the land ascertained, by a reasonable construction of the language used, and a repugnant description, which, by the other descriptions in the patent, clearly appeared to have been made through mistake, not making the patent void. If, however, land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void.⁵ But where lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands,

¹ Doe v. Galloway, 1833; Dyne v. Nutley, 1853.

² Goodtitle v. Southern, 1813; recognised in Miller v. Travers, 1832; and in Slingsby v. Grainger, 1859, (Ld. Cranworth) H. L. See, also, Hardwick v. Hardwick, 1873 (Ld. Selborne, C.); Barber v. Wood, 1877 (Hall, V.-C.); Norreys v. Franks, 1874 (Ir.); Keogh v. Keogh, 1874 (Ir.); Harrison v. Hyde, 1859; Stanley v. Stanley, 1862; West v. Law-

day, 1865, H. L.; White v. Birch, 1867 (Malins, V.-C.); In re Whatman, 1805; Travers v. Blundell, 1877, C. A.

³ Day v. Trig, 1715, cited with approbation (Tindal, C.J.) in Miller v. Travers, 1832; Doe v. Cranstoun, 1840 (Parke, B.).

⁴ Hutchins v. Scott, 1837 (Ld. Abinger). See Hitchin v. Groom, 1848.

⁵ Boardman v. Reed and Ford's Lessees, 1832 (Am.) (McLean, J.).

owned by him, will be taken to be the true one, and the other will be rejected as *falsa demonstratio*.¹

§ 1222. Two cases² may be cited in which the rule which rejects erroneous description, and admits parol evidence for the purpose of showing how the mistake arose, was carried to its extreme bounds. In each a testator had devised to certain legatees a sum which he described as part of a specified stock, of which, at the date of the will, and thence up to the time of his death, he had none, though he had had some such stock some years before, and had sold it out, and invested the produce in other securities of somewhat similar name. Proof of these facts was admitted, not, indeed, “to prove that there was a mistake, for that was clear, but to show how it arose;” and (as pointed out in the later case) not, as it has been erroneously supposed,³ for the purpose of showing that the testator, when he used the erroneous description of the first stock, meant to bequeath the second stock, which he had purchased with the produce of the first, with the result, not of substituting another specific subject in the place of a specific legacy which the will purported to bequeath;—not of substituting the second stock, which the testator had, and did not purport to give, for the first stock which he had not, and did purport to give; but simply of rendering legacies, which were *primâ facie* specific, payable out of the general personal estate.⁴ In other words, a good legacy is not adeemed by being made payable out of a fund which is not the subject of the will.

§ 1223. In connexion with the rule as to “*falsa demonstratio*,” &c., a somewhat arbitrary rule of equitable construction, with reference to the interpretation of wills, may be noticed. This is,

¹ *Loomis v. Jackson*, 1822 (Am.); *Lush v. Druse*, 1830 (Am.); *Jackson v. Marsh*, 1826 (Am.); *Worthington v. Hylyer*, 1808 (Am.); *Blague v. Gold*, 1635; *Swift v. Eyres*, 1636. The object in such cases is, to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is, to give most effect to those things about which men are least liable to mistake: *Davis v. Rainsford*, 1821 (Am.); *McIver v. Walker*, 1815 (Am.).

² *Selwood v. Mildmay*, 1797; *Lindgren v. Lindgren*, 1846.

³ In *Miller v. Travers*, 1832; *Doe v. Hiscocks*, 1839.

⁴ *Lindgren v. Lindgren*, 1846. See, also, *Quennell v. Turner*, 1851; *Tann v. Tann*, 1863 (Romilly, M. R.); and *Hart v. Tulk*, 1852, where the Lords Justices, to set right what they thought was an obvious clerical error, held that the words, “fourth schedule,” in a will, should be read as if they were “fifth schedule.”

that if legacies be given to any specified number of children, as, for instance, 500*l.* apiece to the *three* children of A., and it turn out that at the date of the will A. had any larger number of children, the court will reject the number mentioned in the will, upon the presumption of mistake, and will award a legacy of 500*l.* to each of A.'s children.¹

§ 1224. False statements, introduced into an instrument by way of affirmation only, may, as we have seen, be rejected, provided the remaining description be sufficient to identify the person or thing intended. But they cannot be disregarded, if they have been used by way of *exception* or *limitation*; because, in this latter case, it is obvious that they were intended to have a *material* operation.² Moreover, if there be one subject-matter as to which all the demonstrations in a written instrument are true, and another as to which part are true and part false, the instrument shall be intended to contain words to pass only that subject-matter, as to which all the circumstances are true.³ Such is the correct meaning of the maxim enunciated by Lord Bacon, “Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram.”⁴ For example, on a devise of “all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk;” it appearing that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name; the court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land tax upon all by one contract;⁵ and under a bill of sale assigning “all the household goods of every description at No. 2, Meadow Place, more particularly set forth in an inventory of even

¹ *Daniell v. Daniell*, 1840; *McKech-nie v. Vaughan*, 1873 (James, L.J.); *Morrison v. Martin*, 1846; *Lee v. Pain*, 1844; *Scott v. Fenoulhett*, 1784; *Yeats v. Yeats*, 1852. See *Wrightson v. Calvert*, 1860; *Newman v. Piercey*, 1876.

² *Taylor v. Parry*, 1840 (Maule, J.).

³ *Doe v. Bower*, 1832 (Parke, J.); *Ex parte Kirk*, *In re Bennett*, 1877, C. A.

⁴ *Morrell v. Fisher*, 1849 (Ir.) (Alderson, B.). See, also, *Boyle v. Mulholland*, 1860; *Horner v. Horner*, 1877 (Fry, J.).

⁵ *Doe v. Bower*, 1832; *Homer v. Homer*, 1878, C. A.; *Pogson v. Thomas*, 1840; *Doe v. Ashley*, 1847; *Webber v. Stanley*, 1864; *Smith and Goddard v. Ridgway*, 1866, Ex. Ch.; *Pedley v. Dodds*, 1866.

date herewith," no goods will pass except those specified in the inventory.¹

§ 1225. On the same principle, too, where a testator devised to A. his *freehold* messuage, farms, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a pepper-corn rent, it was held that as the devise correctly described the freehold, the leasehold part was not included therein, though this part was interspersed with, and undistinguishable from, the freehold, and the whole farm had always been treated as freehold by the testator.² This rule of construction will (it is said) be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; it being an established doctrine of construction, that an heir-at-law shall not be disinherited except by express words.³

§ 1226. From what precedes, the following rules may be collected. First, where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author.⁴ Secondly, if the description of the person or thing be *partly applicable* and *partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible.⁵ Thirdly, if the description be partly correct and partly incorrect, and the correct part be sufficient of itself to enable the court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by

¹ Wood v. Rowcliffe, 1851; Morrell v. Fisher, 1849; Barton v. Dawes, 1850.

² Stone v. Greening, 1843; Hall v. Fisher, 1844; Quennell v. Turner, 1851; Evans v. Angell, 1858. See,

also, Gilliat v. Gilliat, 1860; Mathews v. Mathews, 1867.

³ Doe v. Bower, 1832 (Parke, J.).

⁴ Wigr. Wills, 160.

⁵ Doe v. Hiscocks, 1839.

rejecting the erroneous statement.¹ Fourthly, if the description be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe.² Fifthly, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect.³

§ 1227.⁴ It only remains to notice a class of cases to which allusion has before been made⁵—namely, cases in which such evidence is offered to rebut an equity⁶—when parol declarations of intention, in common with other extrinsic evidence, are allowed to affect the operation of a writing, though the writing is on its face free from ambiguity. Where the principles of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise.⁷ The simplest instance of this is when two legacies are left to the same person by different testamentary instruments. Contrary to the general rule,⁸ these are, *primâ facie*, presumed not to have been intended as cumulative, if the sums and the expressed motives of both exactly correspond.⁹ But to rebut this presumption parol evidence of every kind will be received. The effect, indeed, of such evidence is not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed.¹⁰ Extrinsic evidence is also admissible to repel the *primâ facie* presumption against double portions,¹¹ which

¹ Wigr. Wills, 67—70.

² Id. 133.

³ Doe v. Hiscocks, 1839 (Ld. Abinger); Wigr. Wills, 11, cited ante, § 1131, n.

⁴ Gr. Ev. § 296, in part.

⁵ Supra, § 1202.

⁶ See Buckley v. Littlebury, 1711; Francis v. Dichfield, 1742.

⁷ Hall v. Hill, 1841 (Ir.) (Sugden, C.); Hurst v. Beach, 1819; Trimmer v. Bayne, 1802 (Ld. Eldon).

⁸ See Russell v. Dickson, 1853, H. L.; Breeman v. Moran, 1857

(Ir.); Wilson v. O'Leary, 1872, H. L.; Hubbard v. Alexander, 1876.

⁹ Tatham v. Drummond, 1864 (Wood, V.-C.); Tuckey v. Henderson, 1863.

¹⁰ Hurst v. Beach, 1821 (Leach, V.-C.); recognised in Hall v. Hill, 1841 (Ir.) (Sugden, C.); and by C. A. in Re Tussaud's Estate, 1878.

¹¹ See Montague v. Montague, 1852; In re Lawes, 1882. This presumption is not recognised in Scotland: Kippen v. Darley, 1858, H. L.

is raised when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will;¹ or to rebut the presumption that a portionment² of a legatee by a parent or person in loco parentis³ was intended to operate as an ademption (though only pro tanto)⁴ of the legacy.⁵

§ 1228. So, again, to rebut the somewhat forced equitable presumption, that a debt due from a testator is intended to be satisfied by a legacy of a greater or equal amount bequeathed by him to his creditor,⁶ the courts have for a long period eagerly caught at any trifling circumstance, whether arising out of the language of the will,⁷ or brought under their notice by extrinsic evidence,⁸ which will afford an excuse for evading a rule of such questionable policy.⁹ The presumption of a resulting trust in favour of the person who paid the purchase money, which arises where a man purchases property in the name of a stranger, affords another illustration.¹⁰ For the stranger may give parol evidence to show that the purchase was really intended for his benefit—in other words, he may rebut the presumption, and support the instrument.¹¹

§ 1229. In all these cases, when parol evidence has been *first* admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument,

¹ *Weall v. Rice*, 1831; *Ld. Glengall v. Barnard*, 1836; *Hall v. Hill*, 1841 (Ir.) (Sugden, C.), explaining and limiting the two former cases. See *Lady E. Thynne v. Ld. Glengall*, 1848, H. L.; *Chichester v. Coventry*, 1867, H. L.; *Re Tussaud's Estate*, 1878, C. A.; *Nevin v. Drysdale*, 1867 (Wood, V.-C.); *Dawson v. Dawson*, 1867 (id.); *Russell v. St. Aubyn*, 1876; *Bennett v. Houldsworth*, 1877 (Bacon, V.-C.); *Edgeworth v. Johnston*, 1877 (Ir.); *Curtis v. Mackenzie*, 1877 (Jessel, M.R.).

² This need not be by deed, or in consideration of marriage: *Leighton v. Leighton*, 1874.

³ See *Palmer v. Newell*, 1855; *Campbell v. Campbell*, 1866.

⁴ *Pym v. Lockyer*, 1840 (Ld. Cottonham); recognised in *Suisse v. Lowther*, 1843 (Wigram, V.-C.). See *Montefiore v. Guedalla*, 1860; *Fowkes v. Pascoe*, 1875; *Ravenscroft v. Jones*,

1864; *Watson v. Watson*, 1864; *In re Peacock's Estate*, 1872.

⁵ *Trimmer v. Bayne*, 1802 (Ld. Eldon); *Hall v. Hill*, 1841 (Ir.); *Cooper v. Macdonald*, 1873 (Ld. Selborne, C.); *Curtin v. Evans*, 1872; *Kirk v. Eddowes*, 1844 (Wigram, V.-C.); *Hopwood v. Hopwood*, 1860, H. L.; *Schofield v. Heap*, 1859; *Beckton v. Barton*, 1859; *Phillips v. Phillips*, 1864. See ante, § 1146.

⁶ *Brown v. Dawson*, 1705; *Fowler v. Fowler*, 1735; *Atkinson v. Littlewood*, 1874.

⁷ *Rowe v. Rowe*, 1848; *Matthews v. Matthews*, 1755; *Bartlett v. Gilard*, 1826.

⁸ *Wallace v. Pomfret*, 1805.

⁹ See *Edmunds v. Low*, 1857.

¹⁰ Ante, § 1017.

¹¹ *Hall v. Hill*, 1841 (Ir.) (Sugden, C.). See, also, *Sidmouth v. Sidmouth*, 1840; *Williams v. Williams*, 1863; *Nicholson v. Mulligan*, 1868.

counter evidence will be received to *fortify* the presumption. The evidence on either side is admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded.¹ But, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced. In the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument.² If, therefore, the circumstances are on the face of the instrument such as to rebut the presumption drawn by the law, or if the court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either event, the effect of the evidence would be to contradict the apparent meaning of the writing.³

§ 1230. A good illustration of this distinction is afforded by a case⁴ where a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of 800*l.*, part to be paid during his life, and the residue at his decease, and subsequently by his will bequeathed to his daughter a legacy for 800*l.* Parol evidence of the testator's declaration that the legacy was intended as a satisfaction of the debt, was tendered, and, if admissible, was conclusive;⁵ but it was decided, that though the debt was to be regarded in the light of a portion,⁶ yet that as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, could not, under the circumstances, be raised, and that the declaration must, consequently, be rejected. The evidence would have been equally inadmissible in the first instance, on the ground of its inutility, if the ordinary presumption had arisen. But, in this event, had the opponent offered parol evidence to show that

¹ *Kirk v. Eddowes*, 1844; *Hall v. Hill*, 1841 (Ir.); *Ferris v. Goodburn*, 1858.

² *Id.*

³ *Palmer v. Newell*, 1855.

⁴ *Hall v. Hill*, 1841 (Ir.), in which the judgment (Sugden, C.) contains an elaborate discussion of all the important authorities on the subject.

The cases of *Wallace v. Pomfret*, 1805; *Coote v. Boyd*, 1789; *Weall v. Rice*, 1831; *Booker v. Allen*, 1831; and *Lloyd v. Harvey*, 1832, are here much shaken, if not overruled.

⁵ *Hall v. Hill*, 1841 (Ir.), as reported 1 Dru. & War. 112.

⁶ *Id.* 108, 109.

the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 1231. To clearly understand this subject, it is essential to distinguish between mere *legal presumptions* and *rules of construction*. For *presumptions* may be rebutted, and being rebuttable may also be supported by parol testimony. But no evidence can be received on either side, if the court can, *by construction*, arrive at a conclusion respecting the meaning of the instrument.¹ Important as this distinction is, it is by no means easy on all occasions to observe it. The difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. For instead of its being confined to its strict sense, as meaning an inference raised by the courts independently of, or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language.² Thus Lord Thurlow once remarked:³—"Where the *presumption* arises from the construction of words, simply quâ words, no evidence can be admitted,"—evidently using the word *presumption* as tantamount to a rule of law. Among other rules of construction,⁴ occasionally miscalled legal presumptions, is the one (now clearly established) which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts and the same expressed motives appearing in each instrument, induces the court to presume that repetition, and not accumulation, was intended.⁵ Extrinsic evidence cannot be received to impugn this rule of construction, since to admit it would be to construe a writing by parol evidence.⁶

¹ Lee v. Pain, 1845 (Wigram, V.-C.); Hall v. Hill, 1841 (Ir.) (Sugden, C.); Barrs v. Fewkes, 1865 (Wood, V.-C.).

² Lee v. Pain, 1845 (Wigram, V.-C.).

³ Coote v. Boyd, 1789.

⁴ For other rules of construction relating to wills, see 7 W. 4 & 1 V. c. 26 ("The Wills Act, 1837"), §§ 24 (rendered applicable to the estates

of married women by § 4 of "The Married Women's Property Act, 1893," being 56 & 57 V. c. 63) to 33; Re George's Estate, King v. George, 1877, C. A.; Everett v. Everett, 1877, C. A.; In re Ord, 1878.

⁵ Hurst v. Beach, 1821; Suisse v. Lowther, 1843; Lee v. Pain, 1845; Kirk v. Eddowes, 1844; Roch v. Callen, 1847.

⁶ Id.

AMERICAN NOTES.

Parol Evidence Rule. — As has been said, *supra*, the rules of evidence are principally those of exclusion; — the fundamental idea being that all relevant evidence is competent.

A peculiarly sweeping rule of exclusion — which, indeed, from its vagueness and comprehensiveness should, perhaps, rather be considered a principle than a rule — is that which, in any suit between the parties or those identified with them in legal interest, excludes parol evidence which varies, contradicts or controls the ascertained purport of any formal solemn instrument to which the parties may have reduced their agreement or understanding.

Each portion of this definition is important. The rule applies only (1) Between the parties. (2) To exclude parol evidence. (3) When the effect is to vary, contradict or control. (4) When the purport of the instrument has been ascertained. (5) And provided it affirmatively appears that the parties have intended to have the instrument embody their agreement and understanding.

(1) **APPLIES ONLY BETWEEN PARTIES AND PRIVIES.** — A stranger to a written agreement cannot insist upon the writing as the final embodiment of the intention or agreement of the parties. *Dempsey v. Kipp*, 61 N. Y. 462 (1875); *Fonda v. Burton*, 63 Vt. 355 (1891); *Selsers Estate*, 141 Pa. St. 529 (1891); *Hussman v. Wilke*, 50 Cal. 250 (1875); *Hughes v. Sandal*, 25 Tex. 162 (1860); *Blake v. Hall*, 19 La. Ann. 49 (1867); *Juilliard v. Chaffee*, 92 N. Y. 529 (1883); *National Car &c. Builder v. Cyclone &c. Co.*, 49 Minn. 125 (1892); *Kellogg v. Thompson*, 142 Mass. 76 (1886). "The written agreements are conclusive upon no one but the parties to them." *Fonda v. Burton*, 63 Vt. 355 (1891); *Minneapolis &c. R. R. v. Home Ins. Co.*, 55 Minn. 236 (1893); *Clapp v. Banking Co.*, 50 Oh. St. 528 (1893); *Williams v. Fisher*, 28 N. Y. Supp. 739 (1894); *Emmett v. Penoyer*, 76 Hun, 551 (1894). It is clear that where a party is bound, those identified with him in legal interest are also bound. *First Nat. Bk. v. Dunn*, 55 N. J. Law, 404 (1893).

"So as to rights which originate in the relation established by the written contract, or are founded upon it, the rule against varying it by parol applies." *Minneapolis &c. R. R. v. Home Ins. Co.*, 55 Minn. 236 (1893).

The same is true as between one of the parties to the written agreement and a stranger. The rule does not apply. *Forbush v. Goodwin*, 25 N. H. 425 (1852).

Consequently the rule does not apply to a criminal prosecution against one of the parties. *People v. Barringer*, 76 Hun, 330 (1894).

(2) **PAROL EVIDENCE.** — Where a contract is in writing, as for

example a receipt for stock, "parol evidence" is equivalent to oral. *Fay v. Gray*, 124 Mass. 500 (1878).

The rule is the same in equity as at law.

"These writings, there being no allegation or proof of fraud or mistake in their execution, or of any subsequent waiver or modification of the contract they import, are the sole memorial and expositor of the contract, and parol evidence is as inadmissible in equity, as at law, to vary, contradict, or explain them." *Winston v. Browning*, 61 Ala. 80 (1878); *Kelley v. Saltmarsh*, 146 Mass. 585 (1888); *Grand Tower &c. R.R. v. Walton*, 150 Ill. 428 (1894). And it is not necessary to say that a parol contract contemporaneous with the written but on a different subject matter is not affected by the rule under consideration. *Clator v. Otto*, 38 W. Va. 89 (1893).

(3). "VARY, CONTRADICT, OR CONTROL."—The principle is stated in *Serviss v. Stockstill*, 30 Oh. St. 418 (1876). "The contract of the parties was in writing, and could not be thus varied by parol evidence." *Trammell v. Pilgrim*, 20 Tex. 158 (1857); *Bonsack Machine Co. v. Woodrum*, 88 Va. 512 (1891); *Williams v. Waters*, 36 Ga. 454 (1867); *Coapstick v. Bosworth*, 121 Ind. 6 (1889); *Lee v. Fowler*, 19 S. C. 607 (1883); *Herbst v. Lowe*, 65 Wisc. 316 (1886); *Ohlert v. Alderson*, 86 Wis. 433 (1893); *Bank of Upper Canada v. Boulton*, 7 Q. B. U. C. 235 (1850); *La Roche v. O'Hagan*, 1 Ont. Rep. 300 (1882); *Crane v. Elizabeth Library Association*, 29 N. J. Law, 302 (1861); *Bladen v. Wells*, 30 Md. 577 (1869); *Selden v. Myers*, notes, 20 How. 506 (1857); *St. Vrain Stone Co. v. Denver etc. R.R.*, 18 Col. 211 (1893); *Union Stove Wks. v. Arnoux*, 28 N. Y. Supp. 23 (1894).

Where a pledgee of a certificate stock in a corporation gave a receipt to the pledgor embodying an agreement to sell on "one day's notice" parol evidence of a contemporaneous agreement that the pledgee might use the stock is inadmissible. "Its only tendency was to show that the contract made when the stock was pledged was different from that set forth in writing at the time." *Fay v. Gray*, 124 Mass. 500 (1878).

Evidence of preliminary negotiations or conversations is equally incompetent with other evidence in the line of explanation or interpretation. "The rule that parol evidence is inadmissible to add to or vary the terms of a written contract, precludes evidence of the negotiation which preceded or conversations which accompanied the making of it in relation to the subject-matter thereof, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by an inspection of the written instrument." *Corse v. Peck*, 102 N. Y. 513 (1886); *Rogers v. Straub*, 75 Hun, 264 (1894); *Dwelling &c. Ins. Co. v. Shaner*, 52 Ill. App. 326 (1893); *Dixon-Woods Co. v. Phillips Glass Co.* 169

Pa. St. 167 (1895); *Bignall &c. Co. v. Pierce &c. Co.* 59 Mo. App. 673 (1894).

"All anterior and contemporaneous stipulations and representations are merged in the written instrument." *Gooch v. Conner*, 8 Mo. 391 (1844); *Quinn v. Moss*, (Neb.) 63 N. W. 931 (1895); *Parkhurst v. Van Cortlandt*, 1 Johns., Ch. 273 (1814); *Mattison v. Chicago &c. R. R.*, 42 Neb. 545 (1894); *Corse v. Peck*, 102 N. Y. 513 (1886); *Custeau v. St. Louis &c. Co.* 88 Wis. 311 (1894); *Chaplin v. Baker*, 124 Ind. 385 (1890); *Clarke v. Kelsey*, 41 Neb. 766 (1894); *Gilpins v. Consequa*, Peters C. Ct. 85 (1813); *Bladen v. Wells*, 30 Md. 577 (1869); *Whitehead v. Jessup*, 2 Col. App. 76 (1892); *Empire State Phosphate Co. v. Heller*, 61 Fed. Rep. 280 (1894); *Averill v. Sawyer*, 62 Conn. 560 (1893). So of conversations held before the written contract was made, or during its preparation. *Bedford v. Flowers*, 11 Humph. 242 (1850); *Ellmaker v. Franklin Ins. Co.*, 5 Barr. (Pa.) 183 (1817); *Rowell v. Newton*, Q. B. 10 Low. Can. 437 (1860); *Gilpin v. Greene*, 7 Q. B. U. C. 587 (1850); *Groome v. Odgen City*, 10 Utah, 54 (1894). So "correspondence preliminary to a contract cannot be put in evidence in an action thereon if the contract covers the same ground as the correspondence and is complete in itself." *Wonderly v. Holmes Lumber Co.*, 56 Mich. 412 (1885).

So where previous conversations have "been reduced to a written contract, that contract, in the absence of fraud, is the best proof of their agreement, and it cannot be varied or contradicted by parol evidence." *Bell v. Woodman*, 60 Me. 465 (1872). "The uniform decisions of this Court have been, that all oral negotiations between the parties to a written contract, which either preceded or accompanied the execution of the instrument, are to be regarded as merged in it, and that the writing is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves." *Freeman v. Bass*, 34 Ga. 355, 367 (1866).

But it is only because the previous negotiations are inconsistent with, and not because they are prior to, the written agreement that they are rejected. Where such inconsistency does not exist, the rule does not apply. For example, a written option for the purchase of certain property does not exclude parol evidence of a previous contract of agency for the sale of the same property on commission. "The principle that oral evidence cannot be received to vary, alter, or contradict the terms of a written contract is so elementary and well settled that it scarcely requires statement. It is a salutary rule, and one that has, we believe, been consistently adhered to by this court. But the rule itself suggests its limitations. It is the evidence which tends to establish an inconsistent obligation from that which is expressed in the writing which is rejected. Where, therefore, it is shown that there was an original

verbal contract, and a part of it only has been reduced to writing, the rule does not apply as to the part not reduced to writing." *Riemer v. Rice*, 88 Wis. 16 (1894).

NEGOTIABLE INSTRUMENTS. — A certain stringency in applying the parol evidence rule is observable in the case of negotiable instruments, — a result probably affected to a certain indeterminate degree by the substantive rules of the law merchant. *Dow v. Tuttle*, 4 Mass. 414 (1808); *Dobbins v. Blanchard*, 94 Ga. 500 (1894); *Hutchinson v. Hutchinson*, (Mich.) 61 N. W. 60 (1894); *Waddle v. Owen*, 43 Neb. 489 (1895). Thus it cannot be shown that a promissory note was delivered as a gift. *Atkinson v. Blair*, 38 Ia. 156 (1874); Or that an indorsee, at the time of an indorsement to him, verbally agreed to look for payment only to the maker and not rely on the endorser. *Chamberlin v. Ball*, 5 Low. Can. Jur. 88 (1860).

It cannot be shown by oral testimony that a promissory note to pay a certain sum "with interest from date at the rate of eight per cent per annum" five years from date was intended to mean the annual payment of interest. *Koehring v. Muemminghoff*, 61 Mo. 403 (1875). But it has been held that one who receives the promissory notes of a corporation may be shown to have waived the personal liability of the stockholders by a verbal agreement made at the time of accepting the notes. *Bush v. Robinson*, 95 Ky. 492 (1894).

(4). "ASCERTAINED PURPORT." It is essential to the application of the rule that it be ascertained that the instrument in question represents the then present intention or agreement of the party or parties and what that intention or agreement is.

In an action on a fire insurance policy, the language of the policy cannot be controlled by what the applicant for insurance told the agents of the insurance company he desired to insure. "When a contract is reduced to writing and is couched in plain and unambiguous language, Courts must look to it alone to find the intention and meaning of the parties, and parol proof is inadmissible." *Hough v. People's Fire Ins. Co.*, 36 Md. 398, 426 (1872). "The general rule that parol evidence will not be received to add to or alter the terms of a contract in writing, applies to leases as well as other instruments in writing. Except where fraud or illegality has been set up, parol evidence of an agreement not expressed in the writing, is competent only where the writing contains only a part of the contract, or the evidence is admitted to apply the written contract to its subject matter, or to establish a parol contemporaneous agreement between the parties, with respect to the manner in which the rent reserved should be paid, which both parties have acted upon and carried into execution, and, therefore, have given the agreement the force and effect of an accord executed." *Naumberg v. Young*, 44 N. J. L. 331 (1882).

INTERPRETATION AND EXPLANATION. — It follows that parol evidence which puts the court in the position of the party or parties is competent both in connection with the court's duty of construction and also for the purposes of applying the rule under consideration. "It often happens that the contract is not 'plainly and intelligibly stated' in the writing. In such cases parol evidence is admissible, not to contradict or vary, but to explain; provided the explanation does not result in making a new contract. And, although this explanatory evidence generally consists of the facts and circumstances surrounding the parties at the time, yet even their language used in the negotiation may be proven to explain doubtful phraseology in the written contract." *G., C., & S. F. R'y. Co. v. Jones*, 63 Tex. 524 (1885). "While parol evidence cannot be admitted to vary, alter, or qualify a written instrument, yet it is clearly admissible to show the circumstances surrounding the parties at the time of the execution of an instrument, in order that the Court may put itself in the place of the contracting parties, and thus see how the terms of the instrument affect the property or subject-matter of the contract." *Railway Co. v. Beeler*, 90 Tenn. 548 (1891); *Wolfe v. Dyer*, 95 Mo. 545 (1888); *Baker v. Hall*, 158 Mass. 361 (1893); *McHugh v. Gallagher*, 1 Tex. Civ. App. 196 (1892).

Prior negotiations may be used to assist in the work of explanation as to the meaning of terms used. *Rogers v. Straub*, 75 Hun, 264 (1894).

"In every case the words used must be translated into things and facts by parol evidence." *Doherty v. Hill*, 144 Mass. 465 (1887); *Durr v. Chase*, 161 Mass. 40 (1891); *Weber v. Illing*, 66 Wis. 79 (1886); *Sneider v. Patterson*, 38 Neb. 680 (1894); *Hinnemann v. Rosenback*, 39 N. Y. 98 (1868); *Solary v. Webster*, 35 Fla. 363 (1895); *Camp v. Simmons*, 62 Ga. 73 (1878); *Kiser v. Carrollton Dry Goods Co. (Ga.)*, 22 S. E. 303 (1895); *Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah, 319 (1887); *Kentucky &c. Bridge Co. v. Hall*, 125 Ind. 220 (1890); *Lassing v. James*, 107 Cal. 348 (1895); *Sullivan v. Collins (Colo.)* 39 Pac. 334 (1895); *Reinhart v. Oconto Co.*, 69 Wis. 352 (1887); *Fire Ins. Co. v. Wickham*, 141 U. S. 564 (1891); *Colton &c. Co. v. Swartz*, 99 Cal. 278 (1893); *Miller v. Palmer*, 3 Q. B. U. C. o. s. 425 (1834); *Gress Lumber Co. v. Coody*, 94 Ga. 519 (1894); *Vanderlin v. Hovis*, 152 Pa. St. 11 (1892); *Bagley &c. Co. v. Saranac &c. Co.* 135 N. Y. 627 (1892); *Martin v. Brown*, 91 Ia. 574 (1894). So to determine whether a set of figures, where the final one is overwritten and blurred is "25" or "26," parol evidence is competent. *Goldsmith v. Pickard*, 27 Ala. 142 (1855). So identity between two obligations may be established by parol. *Kelly v. Leachman (Idaho)*, 34 Pac. 813 (1893).

An instrument may be so plain and explicit as to leave nothing

"for parol evidence to explain." *Whitehead v. Park*, 53 Ga. 575 (1875); *Millsaps v. Merchant's &c. Bank*, 69 Miss. 918 (1892); *Gulf &c. R. R. v. Jones*, 82 Tex. 156 (1891); *Bonsack Machine Co. v. Woodrum*, 88 Va. 512 (1891); *Holston &c. Co. v. Campbell*, 89 Va. 396 (1892); *Muldoon v. Deline*, 135 N. Y. 150 (1892); *Henry McShane Co. v. Padian*, 142 N. Y. 207 (1894); *Baugh v. White*, 161 Pa. St. 632 (1894); *Falke v. Fassett*, 4 Col. App. 171 (1893).

When the court is put into possession of all information necessary to place it in the position of the parties, the parol evidence rule continues to apply. The court is still bound by the language which the parties have employed. It does not receive evidence for the purpose of creating a different writing from what the parties have made, but simply to ascertain precisely what the writing does, in fact, say.

"Is the testimony offered necessary to understand or apply the language of the written contract, or does it seek to establish one at variance with what is written? If the former, it is permissible; if the latter, it is not." *Bigelow v. Wilson*, 77 Ia. 603 (1889); *Robinson v. Hyers*, 35 Fla. 544 (1895).

Thus a written contract cannot be modified by evidence of what the parties, or one of them, intended. *County of Johnson v. Wood*, 84 Mo. 489 (1884); *Jones v. Swearingen*, 42 S. C. 58, 66 (1894).

But the rule applies where the contract is not contained in any single instrument, but is found in a correspondence between the parties. *Northwestern Fuel Co. v. Bruns*, 1 N. Dak. 137 (1890).

5. **DELIBERATE EMBODIMENT OF AGREEMENT.** — "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." *Ray v. Blackwell*, 94 N. C. 10 (1886).

"There must exist a writing, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions.

This rule of evidence has no application where the writing, on its face, is incomplete, in that it does not purport to contain the whole agreement, or because, lacking some of the essentials, it falls short of being a contract. If it contains such language as imports a complete legal obligation, it is to be presumed that the parties have introduced into it every material item and term, and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed." *Beyerstedt v. Winona Mill Co.*, 49 Minn. 1, 10 (1892).

Consequently the rule does not apply "where the original contract was verbal and entire and a part only reduced to writing." *Chapin v. Dobson*, 78 N. Y. 74 (1879); *Hope v. Balen*, 58 N. Y. 380 (1874); *Pacific Iron Works v. Newhall*, 34 Conn. 67 (1867); *Randall v. Turner*, 17 Oh. St. 262 (1867); *Perry v. Hill*, 68 N. C. 417 (1873); *Cole v. Howe*, 50 Vt. 35 (1877); *Moss v. Green*, 41 Mo. 389 (1867); *Thomas v. Hammond*, 47 Tex. 42 (1877); *Burton v. Morrow*, 133 Ind. 221 (1892); *Staples v. Edwards &c. Co.* 56 Minn. 16 (1893); *Miller v. Goodrich &c. Co.*, 53 Mo. App. 430 (1893); *Emmett v. Penoyer*, 76 Hun, 551 (1894); *Van Kirk v. Scott*, 54 Ill. App. 681 (1894); *Chamberlain v. Smith*, 21 Q. B. U. C. 103 (1861). "Where parties reduce their agreement to writing they can not be allowed to vary its terms by parol: but where it is evident that the agreement is not reduced to writing, but only a part of it, and where that part reduced to writing is merely a partial execution of a part of an entire agreement between the parties, the whole agreement may be proven." *Bradshaw v. Combs*, 102 Ill. 428 (1882). "Oral evidence, in aid of insufficient written evidence of a contract, is certainly admissible, when the contract is not by any statute required to be in writing. A writing drawn up after a contract is concluded by parol, which is meant merely as a memorandum of the transaction, and which does not amount to a contract, may be given in evidence, concurrently with oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction." *Mobile &c. Ins. Co. v. McMillan*, 31 Ala. 711, 721 (1858).

It is competent, at all times, to show by parol the extent to which the written agreement presumably represents the entire agreement of the parties. *Redfield v. Gleason*, 61 Vt. 220 (1888); *Staples v. Lumber Co.*, 56 Minn. 16 (1893).

An arbitrator cannot by parol evidence vary or impeach the award. *Joseph v. Ostell*, 1 Low. Can. Jur. 265 (1857). The parties cannot contradict their deed. "Oral evidence of conversations between the parties previous to the execution of the deed are never admissible in a court of law to contradict, enlarge or abridge the operation of the deed, or to restrict or enlarge its legal intentment. Nor are the acts or declarations of the parties, before or after its execution, admissible to show their understanding of the deed. The intention of the parties must be derived from the deed itself, and the deed must have effect to convey such land as is included in the description as shown upon its face." *Smith v. Fitzgerald*, 59 Vt. 451, 458 (1887).

It cannot be shown that at the time a certain bond was signed it was stated that it was not to become operative unless all the creditors signed it. *Van Bokkelen v. Taylor*, 62 N. Y. 105 (1875).

Or that a bond absolutely promising to pay a certain sum of money was limited, by a contemporaneous parol agreement, to "cover what-

ever should be found to be due upon a settlement." *Moffitt v. Maness*, 102 N. C. 457 (1889).

Or that a deed, absolute on its face, was delivered on condition that it should not become operative until certain things were done. *Haworth v. Norris*, 28 Fla. 763 (1891); *Magee v. Allison* (Ia.), 63 N. W. 322 (1895).

"It is easy to see, said the court in *Miller v. Fletcher*, 27 Gratt. 403 (21 Am. Rep. 356), that the most solemn obligations given for the payment of money would be of but little value as securities, if they might, at a future day, be defeated by parol proof of conditions annexed to their delivery, and not performed; and that a doctrine of this kind would, perhaps, be still more mischievous if applied to deeds of real estate; and that if such a doctrine should prevail, the title of the grantee would be liable to be defeated at any time by evidence of non-performed parol conditions annexed to the delivery of the deed; and that in such cases there would be no safeguards against perjury or the mistakes of 'slippery memory,' and all titles would be as unstable as sand upon the sea shore." *Hubbard v. Greeley*, 84 Me. 340, 345 (1892).

It cannot be shown that at the time of executing a written lease an oral agreement was made enlarging its stipulations. *Gulliver v. Fowler*, 64 Conn. 556 (1894).

Or at the time a defendant signed a subscription paper that he was not to be held on his promise for any larger sum than a certain other person should subscribe. *Parish v. Perham*, 84 Me. 563 (1892).

The rule under consideration does not apply to writings, merely as such. It applies, only, as has been said, to such as embody in legal form a definite understanding.

A prisoner may contradict by parol his written confession. *State v. Brown*, 1 Mo. App. 86 (1876). "The court seems to have supposed that there was an analogy between the written contract, which is the result of a long negotiation between two parties, and the confession in this case. Obviously there is no analogy whatever. When two parties meet to make a bargain respecting a controverted matter, it would throw no light upon the conclusion at last reached and made the basis of a settlement to know their respective pretensions on first opening the conference, and their successive approximations to an agreement. When the question arises, 'What contract did they make?' it would be worse than useless to inquire what were their positions before they agreed at all, and, if they committed their agreement to writing and signed it, the written instrument is so plainly the best and only evidence of the understanding reached by the parties, that words would be wasted to show that all the disputations which preceded that conclusion are wholly irrelevant. But, when a person is giving a narrative of a past transaction, every

word he uses, the very gestures and emphases he employs, go to make up the picture he gives of the event which he describes. If, after stating his recollection diffusely in words, the narrator should himself sit down and in his own language write down what he considered the substance of his narrative, no one, we think, would consider that this more studied statement was more likely to convey the image of the real event to the hearer than the diffuse terms before employed. In such cases, the more naturally and unpremeditatedly the words fall, the greater is the credit due to them. When, instead of writing down his statement in his own language, his words (or the substance of them) are taken down by a transcriber who admits that he changed the 'language and the grammar' of the speaker, it must be very clear that there is room for mistake in the sense which the speaker desired to convey, and when a man on trial for his life offers to show that, not only has his language been changed, but his meaning perverted, it is grave error for a court of justice to silence him." *State v. Brown*, 1 Mo. App. 86 (1876).

So the rule permits a party to contradict a letter apparently amounting to an admission of guilt. "The rule relied upon by the appellant forbidding the introduction of oral evidence to vary the terms of written instruments has no application to the case. This writing did not embody a contract, nor any element of one. No principle of estoppel was applicable. The matter to which this testimony was directed was of no effect, unless as an admission by the defendant of a fact in issue. As a mere admission, it might be contradicted or explained by oral testimony." *Bingham v. Bernard*, 36 Minn. 114 (1886).

The rule does not apply to a mere memorandum of a contract. *Kreuzberger v. Wingfield*, 96 Cal. 251 (1892).

Nor to a written order for goods. "A written order given to plaintiff's agent to 'please ship' a certain article for which 'we agree to pay' a fixed price, named therein, is not necessarily a contract; and, when there is no evidence that such order was ever received and acted upon by the plaintiff, parol evidence is admissible to prove that the article was delivered to defendants under a verbal agreement that it should be taken on thirty days' trial, and returned to plaintiff by defendants if it failed to give entire satisfaction; and, under a proper pleading, parol evidence is admissible to prove that the order, and an acceptance to a certain sight draft, were obtained by false and fraudulent representations." *Nat. Cash Reg. v. Pfister*, 5 So. Dak. 143 (1894).

Neither does the rule apply to the merely formal parts of the written instrument.

Thus the date of a deed may be controlled by parol. *Moore v. Smead*, 89 Wis. 558 (1895).

RECEIPT. — A receipt is not a solemn embodiment of an agreement of the parties.

"The case of receipts is an exception to the general rule that oral testimony is not admissible to contradict or vary a written contract. They may always be explained by oral testimony." *Richardson v. Beebe*, 43 Me. 161 (1857).

It is a mere *prima facie* admission and may be controlled by oral evidence. *Tuley v. Barton*, 79 Va. 387 (1884); *Wilson v. Derr*, 69 N. C. 137 (1873); *Stapleton v. King*, 33 Ia. 28 (1871); *Thompson v. Maxwell*, 74 Ia. 415 (1888); *Ditch v. Vollhardt*, 82 Ill. 134 (1876); *Calhoun v. Richardson*, 30 Conn. 210 (1861); *Russell v. Church*, 65 Pa. St. 9 (1870); *Foster v. Newbrough*, 58 N. Y. 481 (1874); *Pool v. Chase*, 46 Tex. 207 (1876); *Watson v. Miller*, 82 Tex. 279 (1891); *Wildrick v. Swain*, 34 N. J. L. Eq. 167 (1881); *Steinhoff v. M'Rae*, 13 Ont. 546 (1887); *Whitney v. Clark*, 3 Low. Can. Jur. 318 (1859); *Cowan v. Sapp*, 74 Ala. 44 (1883); *Springfield, &c. R. R. v. Allen*, 46 Ark. 217 (1885); *Prairie School Township v. Haseleu*, 3 No. Dak. 328 (1893); *Laughlin v. Fidelity Ins. Co.* 28 S. W. 411 (1894); *Adams v. Davis*, 109 Ind. 10 (1886); *Burke v. Ray*, 40 Minn. 34 (1889); *Macdonald v. Dana*, 154 Mass. 152 (1891); *McLane v. Johnson*, 59 Vt. 237 (1886); *Chapman v. Sutton*, 68 Wis. 657 (1887); *Bowen v. Humphreys*, 24 S. C. 452 (1885); *Rapley v. Klugh*, 40 S. C. 134 (1893); *Rader v. McElvane*, 21 Oreg. 56 (1891); *Furbush v. Goodwin*, 25 N. H. 425 (1852); *Bladen v. Wells*, 30 Md. 577 (1869); *Shepherd v. Busch*, 154 Pa. St. 149 (1893); *Osborne v. Stringham*, 4 So. Dak. 593 (1894); *Ostrander v. Snyder*, 73 Hun. 378 (1893); see also *Livingston v. Wood*, 27 Grant's Chan. 515 (1880).

"A receipt is like any other parol admission of the party signing it, and is open to explanation or correction; and he may show that it was made by mistake or does not exhibit the real state of facts." *Shoemaker v. Stiles*, 102 Pa. St. 549 (1883).

That the receipt is contained in a written bill of sale does not affect the rule. "A further contention of the appellant is that, as the plaintiff executed to Nichols written bills of sale for the cattle, in which they acknowledge the receipt of the purchase money, they cannot show by parol testimony that the price was not paid, and that there was an agreement that they should have a lien upon the cattle until it was paid. The objection is not tenable. Parol testimony is not admissible to contradict or vary the bill of sale so far as it contains a contract; but so far as it is a receipt for the purchase money of the property it may be explained, varied, or contradicted to the same extent that it could be if it was simply a receipt for the purchase money separate from the contract of sale. It is common learning that, so far as a receipt goes only to the acknowledgment of payment, it is merely *prima facie* evidence of the fact of payment, and may be explained, varied, or contradicted by parol testimony." *Riddle v. Hudgins*, 58 Fed. Rep. 490 (1893).

If a receipt amounts to a contract, the same rule applies to it as to any other contract. *Wilson v. Derr*, 69 N. C. 137 (1873); *Stapleton v. King*, 33 Ia. 28 (1871); *Burke v. Ray*, 40 Minn. 34 (1889); *West v. Fleck*, 15 Low. Can. Rep. 422 (1864); *Tuley v. Barton*, 79 Va. 387 (1884); *Morse v. Rice*, 36 Neb. 212 (1893); *Wells &c. Express v. Fuller*, 4 Tex. Civ. App. 213 (1893). So where a receipt contains also covenants of release and discharge. *The Cayuga*, 59 Fed. Rep. 483 (1893). Where an instrument is both a receipt and a contract, parol evidence is admissible to vary only the portion constituting a receipt. *Prairie School Township v. Haseleu* (No. Dak.), 55 N. W. 938 (1893).

"While a receipt is not conclusive evidence of all the facts and statements contained therein, and is open to explanation and contradiction by the party giving it, yet it is always considered as *prima facie* evidence of such facts, and in the absence of a sufficient explanation showing its incorrectness becomes conclusive evidence against the party giving it." *Riley v. Mayor*, 96 N. Y. 331, 338 (1884). So the date of a receipt is *prima facie* correct, and if wrongly stated, may be corrected by parol. *Erickson v. Brookings Co.*, 3 So. Dak. 434 (1892).

It is immaterial that the receipt purports to be one in full of all demands. *Richardson v. Beede*, 43 Me. 161 (1857); *Guyette v. Bolton*, 46 Vt. 228 (1873); *Schultz v. Chicago &c. R. R.*, 44 Wis. 638 (1878); *Grumley v. Webb*, 44 Mo. 444 (1869); *City Bank of Macon v. Kent*, 57 Ga. 283 (1876); *Montforton v. Bondit*, 1 Q. B. U. C. 362 (1845); *Cowan v. Abbott*, 92 Cal. 100 (1891); *Hicks v. Leaton*, 67 Mich. 371 (1887); *Connell v. Vanderwerken*, 1 Mackey, 242 (1881); *Fire Association v. Wickham*, 141 U. S. 564 (1891); *Grant v. Hughes*, 96 N. C. 177 (1887); *The Sophia*, 1 Stuart (Low. Can.) Adm. 219 (1839). Such a receipt, however, naturally affords cogent evidence (though not conclusive) of an accord and satisfaction. *Grant v. Hughes*, 96 N. C. 177 (1887).

A written approval of an account as being correct stands in the same position as a receipt. *Nelson v. Weeks*, 111 Mass. 223 (1872).

BILL OF LADING. — A bill of lading, so far as it is a contract between the parties, is regarded as an embodiment of agreement and cannot be varied by parol. *Arnold v. Jones*, 26 Tex. 335 (1862); *Cox v. Peterson*, 30 Ala. 608 (1857); *Minneapolis &c. R. R. v. Home Ins. Co.*, 55 Minn. 236 (1893). So far as it is a receipt, a bill of lading, like any other receipt, may be varied by parol. *Fowler v. Stirling*, 3 Low. Can. Jur. 103 (1858); *Hedricks v. Morning Star*, 18 La. Ann. 353 (1866); *Harkness v. Sears*, 26 Ala. 493 (1855); *Lazard v. Merchants' &c. Co.*, 78 Md. 1 (1893). Parol evidence is admissible to show that the carrying was performed under a prior parol contract. *Baker v. Michigan &c. R. R.*, 42 Ill. 73 (1866).

It has been held that a bill of lading is in no case more than a

mere memorandum of a contract. "We do not think the doctrine to the extent contended for can be maintained in regard to a bill of lading, and that it is such a complete contract as to exclude all testimony of what is not expressed and necessary to a complete contract. On its face it is but a memorandum, and not in form a contract *inter partes*. It is doubtless an instrument fitted for the occasions in which it is usually employed, and while what it clearly expresses may not be contradicted by oral testimony; unless under the qualification of fraud or mistake, yet there is no rule which excludes testimony to explain it, and to show what the real contract was, of which it is but a note or memorandum at best." *Balto. &c. Steamboat Co. v. Brown*, 54 Pa. St. 77 (1867). And that such an instrument does not exclude evidence of a contemporaneous parol agreement for additional transportation. *Saltsman v. New York &c. R. R.*, 65 Hun, 448 (1892).

BILL OF PARCELS.—Similarly to receipts, contained in bills of lading or otherwise, bills of parcels are not regarded as embodying the agreement of parties and, consequently, may be varied by parol. *Harris v. Johnston*, 3 Cranch, 311 (1806); *Linsley v. Lovely*, 26 Vt. 123 (1853); *Grant v. Frost*, 80 Me. 202 (1888). With the same similarity to receipts, however, if a bill of parcels express the contract of the parties, it is no more subject to variation or control by parol evidence than any other contract. *Linsley v. Lovely*, 26 Vt. 123 (1853).

A "berth check" issued by a sleeping car company, though evidence of a contract by the company, is not within the parol evidence rule, and may be contradicted by parol. *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646 (1893). "An expert railroad officer, employee, or traveler may be familiar enough with the current forms of these berth checks to decipher, on a blue or other colored ground, by the lights in a sleeping car at night, the marks of a lead pencil, made by the average conductor, standing in a car on a moving train, on an average track in this circuit, so as safely to accept it, as the only admissible evidence to him and to the courts, as to the berth he was allowed to select and did select, and had delivered to him, but, speaking from an average experience and observation, it is safe to say that if it is, or ever becomes, the sound and settled rule of law that such berth checks as are now commonly issued shall be conclusive evidence as to the berth contracted for, whenever any question arises between the company and the passenger as to that matter, the rule will put one of the parties largely and in many instances wholly in the power of the other." *Mann, &c. Co. v. Dupre*, 54 Fed. Rep. 646 (1893).

COLLATERAL AGREEMENT.—Questions of considerable nicety frequently arise as to whether the subject matter of a contemporaneous or prior parol agreement was intended by the parties to be

covered by the parties in their subsequent written agreement; —in which case the rule applies to exclude the parol evidence; or, on the other hand, was on a collateral matter not intended to be so embraced. The rule has no “application to collateral undertakings.” *Chapin v. Dobson*, 78 N. Y. 74 (1879); *Bladen v. Wells*, 30 Md. 577 (1869).

The difficulty is not so much in deciding what a collateral agreement is. As is said in a well considered New Jersey case, “There is a class of cases where the parties concluding an agreement which is reduced to writing, have, at the same time and on the same consideration, negotiated by parol another agreement which is collateral and on a subject distinct from that to which the written contract relates, in which oral evidence of such an agreement is held to be competent.” *Naumberg v. Young*, 44 N. J. L. 331 (1882).

Speaking of the rule under consideration the Court say: —

“Undoubtedly this rule of evidence presupposes that the parties intended to have the terms of their agreement embraced in the written contract. If it was designed that the written contract should contain only a portion of the terms mutually agreed upon, and that the rest should remain in parol, the parties have not put themselves under the protection of the rule. But in what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? The question is one for the court, for it relates to the admission or rejection of evidence. It cannot be assumed that the written contract was designed as an imperfect expression of the parties’ agreement, from the mere fact that the written agreement contains nothing on the subject to which the parol evidence is directed. On that assumption that part of the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. And to permit the parties to lay the foundation for such parol evidence by oral testimony that they agreed that that part only of their contract should be included in the written agreement, would open the door to the very evil against which the rule was designed to protect. The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties’ agreement, is the contract itself.” *Naumberg v. Young*, 44 N. J. L. 331, 339 (1882). “It is well settled that it is not competent for a party to prove an oral agreement contradictory of or inconsistent with the written contract, but any collateral, independent fact, about which the written agreement is silent can be given in evidence.” *Stallings v. Gottschalk*, 77 Md. 429 (1893).

The difficulty arises where the contemporaneous parol agreement is on a subject matter which is cognate to the subject matter of the written contract. In such a case, if the subject matter of the parol

agreement, in the opinion of the court, was, in the contemplation of the parties, covered by their written agreement, then, even where the written contract is silent on the subject, evidence of the parol agreement is excluded.

In deciding the question, the court may be guided by the minuteness with which the written contract covers the details of the agreement of the parties. Where such written contract minutely covered the sale of a stock of goods, "an oral contract between the parties to the effect that in consideration of such contract of sale, the seller will not engage in the same business in the same city, is not such a collateral undertaking as to permit parol proof thereof in explanation of the written contract." *Gordon v. Parke & Co.*, 10 Wash. 18 (1894).

It is as much against the rule to add a term to a written contract on which the contract is silent by an oral agreement, as to modify by oral agreement the terms as to which the written contract speaks. "Parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract, than it is to vary its terms." *Brandon Mfg. Co. v. Morse*, 48 Vt. 322 (1875).

Certainly where the provision sought to be established by parol was intentionally omitted from the written agreement. *Sanborn v. Murphy*, 86 Tex. 437 (1894).

But where the written contract is silent as to price, it is competent to show the contract of the parties and their course of dealing. *Staples v. Edwards & Co. Lumber Co.*, 56 Minn. 16 (1893). And where the price is left blank in a freight receipt, the actual amount paid can be shown by parol. *Georgia, & Co. v. Reid*, 91 Ga. 377 (1893). So where a written contract for the delivery of wood fails to specify the time of payment, the plaintiff cannot show a contemporaneous oral agreement to pay for the wood as delivered. *Brandon Mfg. Co. v. Morse*, 48 Vt. 322 (1875). So in a contract for delivery of milk the duration of the contract on which the writing is silent, cannot be shown by parol. *Irish v. Dean*, 39 Wis. 562 (1876).

An agreement to surrender a note given for stock and accept back the stock if the makers of the note became dissatisfied cannot be shown in defence of an action on the note which provides merely for the payment of money. *Riley v. Treanor*, (Tex. Civ. App.) 25 S. W. 1054 (1894).

If, on the other hand, the parties have not, in the opinion of the court, seen fit to cover this portion of their entire agreement in the final written form, then evidence of the parol contemporaneous agreement is competent; the circumstance that the parties might with entire propriety have included the subject matter of the parol agreement being regarded as immaterial. *Phoenix Pub. Co. v. Riverside Clothing Co.*, 54 Minn. 205 (1893).

It is a natural result of the narrowness of this line of demarkation which, in the intricacy and complexity of the varying facts of particular cases, assumes at times a vagueness almost nebulous, that close questions of construction are constantly arising and that decisions in individual cases will be found to be dependent rather upon the feeling or judicial instinct of particular judges than upon any more well defined rule.

ILLUSTRATIONS. — A verbal warranty that a vessel shall be insurable in a given sum at a certain rating, made at the time of a written contract of sale of the vessel, is competent as not varying the contract. *La Roche v. O'Hagan*, 1 Ont. Rep. 300 (1882). A verbal agreement of warranty made at the time of a written contract of sale is sufficient consideration for a subsequent written warranty. Or may be set up in defence. *Chapin v. Dobson*, 78 N. Y. 74 (1879). *Collette v. Weed*, 68 Wis. 428 (1887). So a verbal agreement to pay a certain mortgage made at the time of a deed of the premises, can be shown. *Clark v. Hayward*, 51 Vt. 14 (1878).

So where, in consideration that A. would execute a lease of certain premises to B., B. verbally agreed that A. might enter and remove a certain crop of wheat on the premises, it was held that the verbal independent agreement could be shown in defence of an action of trespass by A. against B. for the removal of the crop. *McGinness v. Kennedy*, 29 Q. B. U. C. 93 (1869). A collateral agreement to grade certain premises, made as an inducement for their sale, can be enforced. *Durkin v. Cobleigh*, 156 Mass. 108 (1892). On a sale of soap by written order, a contemporaneous "collateral oral undertaking by the defendant to advertize" the soap may be shown. *Ayer v. Bell Mfg. Co.*, 147 Mass. 46 (1888).

A verbal contract to do a specified thing with certain bonds when delivered in pursuance of a contemporaneous written contract is enforceable. *Snow v. Alley*, 151 Mass. 14 (1890). So of a parol agreement to apply the proceeds of certain unsettled accounts to the discharge of a mortgage indebtedness. *Redfield v. Gleason*, 61 Vt. 220 (1888).

In an action of contract on a written agreement for the exchange of a tract of land which merely specifies the location of the land and its price, evidence is competent that the plaintiff orally agreed that the land was in a certain state of cultivation and had been built upon. "We think, however, that this evidence does not vary, alter, or change the contract or memorandum, whatever the writing may be called. The evidence of the quality and condition of the land was about matters not attempted to be put in writing; it was outside of the contract and memorandum; contemporaneous with it, to be sure, but in no way conflicting with, altering or changing it; neither party thought of putting a description of the quality of the

land or improvements thereon, in writing; the contract was simply to furnish data from which to execute the deed to the land, and the mortgages to secure the deferred payments. The contract being about another matter entirely, does not change the memorandum in writing." *Schoen v. Sunderland*, 39 Kans. 758 (1888).

An independent agreement, at the time of making a written contract for cutting certain wood, that the cutter should have a lien on the wood to secure payment for his work, is competent in an action of replevin for the wood. *Byers v. McMillan*, 15 Can. Supreme Ct. 194 (1887).

In an action on a promissory note for the price of a sewing machine evidence is competent of a contemporaneous parol agreement "to furnish the defendant all the material necessary for the manufacture of quilts enough, at a stipulated price, to pay for the machine, and that payment of the notes was to be demanded only in case of a failure on the part of the defendant to manufacture the material as furnished into quilts." *Weeks v. Medler*, 20 Kans. 57, 64 (1878).

A parol agreement to grade certain premises, made at the time of their sale, can be sued upon. *McCormick v. Cheevers*, 124 Mass. 262 (1878).

A parol agreement, on giving a deed, that the grantor shall remain in possession for a certain time, is competent. *Hamilton v. Clark* (Tex. Civ. App.), 26 S. W. 515 (1894).

A parol agreement by a mutual life insurance company to allow a certain rebate on a premium note at maturity can be shown in defence of a suit on the premium note. *Michigan Mut. Life Ins. Co. v. Williams*, 155 Pa. St. 405 (1893).

On the other hand, a verbal warranty that the goods sold were adapted to a certain purpose cannot be shown in defence of an action to recover for their price under a written contract of sale. "Assuming that the talk was not seller's talk, such an arrangement was executory in its character, and constituted a part of the agreement as made, and should have been embraced in the written contract. To admit evidence of it now would be to vary essentially by oral testimony the written contract." *Kinnard Co. v. Cutter Co.*, 159 Mass. 391 (1893); *Wilcox v. Cate*, 65 Vt. 478 (1893).

To the contrary effect, see *Aultman v. Clifford*, 55 Minn. 159 (1893). "The written instrument or order being incomplete, and not purporting on its face to express the whole of the mutual agreement of the parties, parol evidence was admissible to show an oral agreement on the part of plaintiff, which constituted a condition on which defendant gave the written order, and on which performance on his part was to depend, as that the binder should be of a certain quality."

The further limitations on this rule are well stated in *Case v. Phoenix Bridge Co.*, 134 N. Y. 78 (1892). "To bring a case within

the rule admitting parol evidence to complete an entire agreement of which a writing is only a part, two things are essential: First. The writing must appear on inspection to be an incomplete contract; and Second. The parol evidence must be consistent with and not contradictory to the written instrument." *Tuley v. Barton*, 79 Va. 387 (1884).

The mischief of too lax an interpretation of the rules admitting parol evidence of collateral agreements is well stated in *North-western Fuel Co. v. Bruns*, 1 No. Dak. 137 (1890). "In attempts to mete out justice in individual cases, so many distinctions have been made, in order to escape the force of the doctrine excluding all oral stipulations not embraced in a written contract, that the proper application of the rule has become a problem so difficult of solution that the value of the rule has been seriously impaired. The uncertainty which has resulted has given rise to much litigation in which each party has been sanguine of success because precedents to support each theory could be found. This is to be deplored, and it is wise that this court should at the outset uphold this principle in its full integrity."

PRESUMPTION. — In solving the difficulties attending a decision as to whether a contemporaneous parol agreement is or is not "collateral" use has been made in certain states of the aid of a rule that "when a contract has been reduced to writing without any uncertainty as to the object and extent of the obligation, the presumption is that the entire contract was reduced to writing." *Dodge v. Kiene*, 28 Neb. 216 (1889); *Weaver v. Gainesville*, 1 Tex. Civ. App. 286 (1892); *Societa Italiana v. Sulzer*, 138 N. Y. 468 (1893); *Caulfield v. Hermann*, 64 Conn. 325 (1894); *Case v. Phoenix Bridge Co.*, 134 N. Y. 78 (1892); *Beyerstedt v. Winona Mill Co.*, 49 Minn. 1 (1892). "In the absence of fraud, or mistake, a writing in itself complete, and which has been executed with deliberation, cannot be varied or altered by oral evidence. It is presumed to contain the sole memorial of the contract of the parties: in it all prior negotiations or stipulations are merged; and when these are intentionally omitted, it cannot be said by either party subsequently that they were not waived." *Couch v. Woodruff*, 63 Ala. 466 (1879). The presumption has even been stated by a well esteemed court as a "conclusive presumption" which, as has been said, is a contradiction in terms. "When the parties to a contract have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing, and all oral evidence, therefore, of what was said during the negotiation of the contract, or at the time of its execution, must be excluded on the ground that the parties have made the writing the only repository

and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned." *Van Syckel v. Dalrymple*, 32 N. J. E. 233 (1880); *Broughton v. Null*, 56 Mo. App. 231 (1893).

As usual, this "conclusive presumption" is a transference into the law of evidence of a rule of the positive law; — as where it is said that where a lease is in writing the rights and duties of the parties depend upon the terms or legal intendment of the lease itself, as it is conclusively presumed that the whole engagement is embraced therein. *Wilson v. Deen*, 74 N. Y. 531 (1878).

A QUESTION FOR THE COURT. — "In what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? The question is one for the Court, for it relates to the admission or rejection of evidence." *Naumberg v. Young*, 44 N. J. Law, 331, 339 (1882).

SCOPE OF THE RULE. — The primary object of the parol evidence rule is to protect the integrity of written instruments. It assumes that the parties by reducing their negotiations or agreements to this form have intended that the treachery of memory and the uncertainty of unformulated agreements shall be, so far as this matter is concerned, eliminated from their relations. To receive parol evidence on the points covered by the written agreement would be to introduce precisely the elements which the parties have agreed to eliminate; expose them to the exact danger against which they have endeavored to guard.

But while the "parol evidence rule" endeavors to provide that a written instrument shall be allowed to mean exactly what it says it means and continue to be the final repository of the intention of the parties as to the points which it covers, it does not undertake to prescribe what the effect of the instrument shall be as between the parties, either at law or in equity. It says of the written instrument, in a proper case, "This is the agreement of the parties." But it does not go forward and say, "This agreement shall be enforced as made," or "This agreement is conclusive as between the parties." With this the "parol evidence rule" has nothing whatever to do. It is, of course, a widely different thing to say that a written instrument shall not be varied by parol evidence and to say that a party cannot show facts, by parol or otherwise, which will entitle him to relief from the effect of the instrument itself, in its unvaried condition. The first is settled by a rule of evidence, now under consideration. The second is a matter of substantive law. Whatever, under the rules of substantive law, may be shown, at law or in equity, to enable a party to protect himself against the legal effect of a written instrument, he may prove; — entirely apart from any consideration of the "parol evidence rule" which has simply provided that the language of the instrument itself should not be

altered. In ascertaining what these proveable facts are, the rules of evidence are not concerned. Such rules simply decide how these proveable facts may be established.

For example, where a settlement is relied on in defence of an action it is competent for the plaintiff to show that he did not read or write the language and did not understand the effect of what he was signing. *Lord v. American, &c. Ins. Co.*, 89 Wis. 19 (1894).

MORTGAGE OR TRUST. — So, as equity will refuse a deed absolute on its face, its *prima facie* legal effect if satisfied that it was, as between the parties, a mortgage, parol evidence is admissible to establish the fact that the deed is merely security for a debt. "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice." *Peugh v. Davis*, 96 U. S. 332 (1877); *Eckford v. Berry*, 87 Tex. 415 (1894); *Kibby v. Harsh*, 61 Ia. 196 (1883); *Matthews v. Sheehan*, 69 N. Y. 585 (1877); *Weathersly v. Weathersly*, 40 Miss. 462 (1866); *Raynor v. Lyons*, 37 Cal. 452 (1869); *Holt v. Moore*, 37 Ark. 145 (1881); *Wright v. Gay*, 101 Ill. 233 (1882); *Lawrence v. Du Bois*, 16 W. Va. 443 (1880); *Matthews v. Holmes*, 5 Grant's Chan. & App. 1 (1853); *Peagler v. Stabler*, 91 Ala. 308 (1890); *Pancake v. Cauffman*, 114 Pa. St. 113 (1886); *Perkins v. West*, 55 Vt. 265 (1882); *Lewis v. Bayliss*, 90 Tenn. 280 (1891); *Nesbitt v. Cavender*, 27 S. C. 1 (1887); *Winters v. Earle*, 52 N. J. Eq. 52 (1893); *McCormick v. Herndon*, 67 Wis. 648 (1887); *First Nat. Bk. v. Ashmead*, 23 Fla. 379 (1887); *Gilchrist v. Beswick*, 33 W. Va. 168 (1889); *Campbell v. Dearborn*, 109 Mass. 130 (1872); *Crutcher v. Muir*, 90 Ky. 142 (1890); *Bernard v. Walker*, 2 E. & A. (Ont.), 121 (1862); *Smith v. Lang*, 2 Tex. Civ. App. 683 (1893); *Davis v. Hopkins*, 18 Col. 153 (1893).

So it may be shown by parol, under proper circumstances, that a

bill of sale is as between the parties to be treated as a chattel mortgage. *Voorhies v. Hennessy*, 7 Wash. 243 (1893).

Or that an absolute assignment of a note, was intended as collateral security. *Vickers v. Battershall*, 84 Hun, 496 (1895); *McCathern v. Bell*, 93 Ga. 290 (1893). Or that a judgment was intended merely to secure collateral results to the creditor. *Davidson v. Young*, 167 Pa. St. 265 (1895).

For similar reasons, it may be shown by parol that the *prima facie* effect of an absolute conveyance should be refused a given instrument because the holder really is a trustee. *Williams v. Jenkins*, 18 Grant's Chan. 536 (1871); *Barr v. Barr*, 15 Grant's Chan. 27 (1868); *Ripley v. Seligman*, 88 Mich. 177 (1891); *Beck v. Beck*, 43 N. J. Eq. 39 (1887); *Ryan v. O'Connor*, 41 Oh. St. 368 (1884); *Parker v. Logan*, 82 Va. 376 (1886); *Lofton v. Sterrett*, 23 Fla. 565 (1887); *Clark v. Haney*, 62 Tex. 511 (1884); *Marsh v. Davis*, 33 Kans. 326 (1885); *Learned v. Tritch*, 6 Colo. 432 (1882); *Bright v. Knight*, 35 W. Va. 40 (1891); *Crow v. Watkins*, 48 Ark. 169 (1886); *Brick v. Brick*, 98 U. S. 514 (1878); *Minchin v. Minchin*, 157 Mass. 265 (1892).

For example, it in no sense varies the terms of a deed to A. for B. to establish by parol a resulting trust in his own favor. *Harvey v. Pennypacker*, 4 Del. Chan. 445 (1872); *Collins v. Corson* (N. J. Eq.), 30 Atl. 862 (1894).

DURESS AND UNDUE INFLUENCE. — So it in no way infringes the rule under consideration to deny the written instrument its legal effect on the ground that its execution was obtained by duress. *Miller v. Miller*, 68 Pa. St. 486 (1871); *Moore v. Rush*, 30 La. Ann. 1157 (1878); *Spaids v. Barrett*, 57 Ill. 289 (1870); *Seiber v. Price*, 26 Mich. 518 (1873); *Vicknair v. Trosclair*, 45 La. Ann. 373 (1893).

Or, as in case of a will, by undue influence. *Harvey v. Sullens*, 46 Mo. 147 (1870); *Lewis v. Mason*, 109 Mass. 169 (1872); *Wiley v. Ewalt*, 66 Ill. 26 (1872).

So in case of a conveyance *inter vivos*. *Taylor v. Crockett*, 123 Mo. 300 (1894).

ILLEGALITY. — So it is no infringement of the rule excluding parol evidence to receive such evidence for the purpose of showing that the instrument should not be enforced because executed for an illegal object. *Friend v. Miller*, 52 Kans. 139 (1893).

For example, to obtain usurious interest. *Chamberlain v. McClurg*, 8 W. & S. 31 (1844); *Newsom v. Thighen*, 30 Miss. 414 (1855); *Hewett v. Dement*, 57 Ill. 500 (1870); *Daw v. Niles* (Cal.), 33 Pac. 1114 (1893).

To obtain payment of the price of intoxicating liquors contrary to law. *Pratt v. Langdon*, 97 Mass. 97 (1867).

To avoid a legal prohibition against gifts between persons

living together in concubinage. *Lazare v. Jacques*, 15 La. Ann. 599 (1860).

To obtain an undue preference over other creditors of a common debtor. *Benicia, &c., Works v. Estes* (Cal.), 32 Pac. 938 (1893).

"This rule of evidence is not infringed by the admission of parol testimony which is not intended as a substitution for or an addition to a written contract, but which goes to show that the instrument is void or voidable, and that it never had any legal existence or binding force either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject matter of the contract. . . . Parol testimony may be admitted to show that the execution of a written contract was brought about by a fraudulent representation." *State v. Cass*, 52 N. J. L. 77 (1889).

INCAPACITY. — There is nothing objectionable to the "parol evidence rule" in refusing operation to an instrument on the ground that it was executed by a person who at the time was incapacitated by reason of insanity. *Staples v. Wellington*, 58 Me. 453 (1870); *Webster v. Woodford*, 3 Day, 90 (1808); *Mitchell v. Kingman*, 5 Pick. 431 (1827); *Beals v. See*, 10 Barr, 56 (1848); *Wiley v. Ewalt*, 66 Ill. 26 (1872); *Parker v. Davis*, 8 Jones (N. C.), Law, 460 (1862).

Or by reason of intoxication. *Wigglesworth v. Steers*, 1 H. & M. (Va.), 69 (1806); *Phelan v. Gardner*, 43 Cal. 306 (1872).

FRAUD. — A party is entitled to prove that a certain instrument is inoperative because obtained by fraud. *Calhoun v. Richardson*, 30 Conn. 210 (1861); *Feltz v. Walker*, 49 Conn. 93 (1881); *Cushing v. Rice*, 46 Me. 303 (1858); *Thompson v. Bell*, 37 Ala. 438 (1861); *Lull v. Cass*, 43 N. H. 62 (1861); *Burtner v. Keran*, 24 Gratt. 42 (1873); *Wharton v. Douglass*, 76 Pa. St. 273 (1874); *Kostenbader v. Peters*, 80 Pa. St. 438 (1876); *Hines v. Driver*, 72 Ind. 125 (1880); *Gage v. Lewis*, 68 Ill. 604 (1873); *Barnard v. Roane Iron Co.*, 85 Tenn. 139 (1886); *Mayer v. Dean*, 115 N. Y. 556 (1889); *Van Alstyne v. Smith*, 82 Hun, 382 (1894); *Kirkpatrick v. Clark*, 132 Ill. 342 (1890); *Gross v. Drager*, 66 Wis. 150 (1886); *National, &c. Co. v. Pfister*, 5 So. Dak. 143 (1894); *Case v. Case*, 26 Mich. 484 (1873); *Kranich v. Sherwood*, 92 Mich. 397 (1892); *Scroggin v. Wood*, 87 Ia. 497 (1893); *Ewing v. Smith*, 132 Ind. 205 (1892); *Volkenand v. Drum*, 154 Pa. St. 616 (1893); *Dinkler v. Baer*, (Ga.) 17 S. E. 953 (1893). *Grand Tower, &c. R. R. v. Walton*, 150 Ill. 428 (1894); *Peck v. Jenison*, 99 Mich. 326 (1894); *Sherff v. Jacobi*, 71 Hun, 391 (1893); *Halsell v. Musgrave*, 5 Tex. Civ. App. 476 (1893); *Taylor v. Crockett*, 123 Mo. 300 (1894).

This ability to prove fraud is not only a shield. It may be used as a basis for invoking the active aid of the court. *McLean v. Clark*, 47 Ga. 24 (1872); *Turner v. Turner*, 44 Mo. 535 (1869); *Thomas v. Kennedy*, 24 La. Ann. 209 (1872); *Grider v. Clopton*, 27 Ark. 244 (1871); *Wilson v. Higbee*, 62 Fed. Rep. 723 (1894);

The rule applies equally to wills. *McLaughlin v. McDevitt*, 63 N. Y. 213 (1875).

CONSIDERATION.—The consideration for executing a written agreement may be shown by parol. The underlying reasoning of this line of cases seems to be that of fraud or estoppel. The grantors in a deed of land to a railroad, the consideration of which was a contemporaneous parol agreement to maintain perpetually a station at a certain place may, on removal of the station, sue for the value of the land as for a failure of consideration. *International, &c. R. R. v. Dawson*, 62 Tex. 260 (1884). Provided, the contract does not provide otherwise. *Faires v. Cockrill*, (Tex.) 31 S. W. 190 (1895). But see, *contra*, *Conwell v. Springfield, &c. R. R.*, 81 Ill. 232 (1876). So of putting in a side track. *Huckestein v. Kelly*, 152 Pa. St. 631 (1893).

So of the promised non-erection of a church. *Kelly v. Carter*, 55 Ark. 112 (1891). Or the location of a railroad. *Lake, &c. R. R. v. Squire*, (Ia.) 57 N. W. 307 (1894). Or an agreement to cancel a prior instrument. *Guidery v. Green*, 95 Cal. 630 (1892).

Where the execution of a written contract was induced by a parol agreement that a certain printed clause should not be binding, such parol agreement can be shown. "No principle is better settled . . . than that parol evidence is admissible to show a verbal contemporaneous agreement, which induced the execution of a written obligation, though it may vary or change the terms of the written contract. . . It is a fraud in the defendants, in order to procure an unfair advantage, subsequently to deny the parol qualification, upon the faith of which the contract was made." *Cullmans v. Lindsay*, 114 Pa. St. 166 (1886); *Ferguson v. Rafferty*, 128 Pa. St. 337, 349 (1889).

Where the execution of a written agreement is procured by giving a parol agreement, such agreement can be shown. "It is settled by a considerable line of authority that where the execution of a written agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument. Among the cases establishing this principle are: *Chapin v. Dobson*, 78 N. Y. 74; *Ferguson v. Rafferty*, 128 Pa. St. 337." *Barnett v. Pratt*, 37 Neb. 349 (1893). *American, &c. Association v. Dahl*, 54 Minn. 355 (1893).

Where a railroad employee executed a release for injuries caused by the negligence of the company, in consideration of the company giving him "steady and permanent employment," such an agreement is not merged in the written release. *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109 (1892).

But in a similar case where the consideration recited was the

nominal one of "one dollar" the employee was not allowed to prove that the actual consideration of the release was the payment of certain expenses of his illness. *St. Louis, &c. R. R. v. Dearborn*, 60 Fed. Rep. 880 (1894). So it cannot be shown that the company agreed, as an additional consideration, to give the releasor remunerative employment. *Myron v. Union R. R. (R. I.)*, 32 Atl. 165 (1895). And it has been held that where rent in money is reserved in a written lease, parol evidence will not be admitted to show that immediately prior to the execution of the lease, the lessee was induced to sign it by an agreement that part of the rent was to be taken out in boarding. *Stull Thompson*, 154 Pa. St. 43 (1893). Or that repairs other than those specified should be made. *Averill v. Sawyer*, 62 Conn. 560 (1893); *Gulliver v. Fowler*, 64 Conn. 556 (1894). Or, in case of a mortgage, that as part of the consideration, the mortgagor was to board the mortgagee free, though the court suggest that a counterclaim might be maintained on such an agreement. *Kracke v. Homeyer*, 91 Ia. 51 (1894). Or, as an inducement to a sale of a farm, that the vendee would give the vendor a third of the net proceeds of the wheat crop standing on the same.

"It is not a question of the statute of frauds, but an attempt to vary the terms and effect of a written instrument by parol." *Adams v. Watkins*, 103 Mich. 431 (1894).

In general, it may be shown by parol what is the real consideration of a written instrument. *Manning v. Pippen*, 86 Ala. 357 (1888); *Wolfe v. McMillan*, 117 Ind. 587 (1888); *Wood v. Moriarty*, 15 R. I. 518 (1887); *Straus v. Bodeker*, 86 Va. 543 (1889); *Womack v. Wamble*, (Tex.) 27 S. W. 154 (1894); *Shank v. Coulthard*, 19 Grant's Chan. 324 (1872); *Davis v. McSherry*, 7 Q. B. U. C. 490 (1850); *Guidery v. Green*, 95 Cal. 630 (1892); *Reese v. Strickland*, 96 Ga. 784 (1895); *Brice v. Miller*, 35 S. C. 537 (1891); *Bradshaw v. Coombs*, 102 Ill. 428 (1882); *Luce v. Foster*, 42 Neb. 818 (1894); *Fire Ins. Co. v. Wickham*, 141 U. S. 564 (1891); *Velten v. Carmack*, 23 Oreg. 282 (1892); *Horn v. Hansen*, 56 Minn. 43 (1893); *Jackson v. Chicago, &c. R. R.*, 54 Mo. App. 636 (1893); *Beckman v. Beckman*, 86 Wis. 655 (1894); *Luce v. Foster*, 42 Neb. 818 (1894); *Zelch v. Hirt*, 59 Minn. 360 (1894). Or that there was a consideration in addition to that stated. *Hill v. Whidden*, 158 Mass. 267 (1893); *Bolles v. Sachs*, 37 Minn. 315 (1887); *Champion v. Munday*, 85 Ky. 31 (1887); *Hickman v. Hickman*, 55 Mo. App. 303 (1893); *Johnson v. East Carolina, &c. R. R.* 116 N. C. 926 (1895); *Green v. Randall*, 51 Vt. 67 (1878).

But the additional consideration must, it is said, be consistent with the deed, and it has accordingly been held that where a deed conveying land contains a covenant against incumbrances, evidence of a contemporaneous oral agreement by the grantee to assume an existing incumbrance, as part of the consideration, is not competent.

Brown v. Morgan, 56 Mo. App. 382 (1893). To contrary effect, see *Newcomb v. Wallace*, 112 Mass. 25 (1873). The use of the phrase "value received" does not prevent evidence that the real consideration was executory. *Sullivan v. Lear*, 23 Fla. 463 (1887); But it is not competent to show by parol that a deed reciting a consideration was in fact given without consideration. *Magee v. Allison*, (Ia.) 63 N. W. 322 (1895). But where a mortgage was given without consideration that fact may be established by parol. *Baird v. Baird*, 145 N. Y. 659 (1895). A deed purporting to be upon a money consideration can be shown by parol to have been given in consideration of marriage. *Tolman v. Ward*, 86 Me. 303 (1894).

The rule applies to negotiable instruments in suits between the original parties. *Ohleyer v. Bernheim*, 67 Miss. 75 (1889); *Pitts v. Allen*, 72 Ga. 69 (1883); *Branch v. Howard*, 4 Tex. Civ. App. 271 (1893). Or as against parties taking after maturity or with notice. *Peck v. Beckwith*, 10 Oh. St. 497 (1860).

A purchaser of real estate may prove a contemporaneous parol agreement by the vendor to grade and build a certain street and cause water to be put therein which was the inducement and consideration of the purchase. *Durkin v. Cobleigh*, 156 Mass. 108 (1892); *Cole v. Hadley*, 162 Mass. 579 (1895).

"The defendant further contends that the deed offered in evidence is conclusively presumed to include the whole contract between the parties thereto. While this contention may be conceded to the defendant, it is, nevertheless, true that, in a deed like that in this case, where there is a mere statement of a certain amount of money without more as the consideration, it is but inattentive recital common in conveyancing of a consideration in most general use, which forms no part of the contract. The statement of the amount of the consideration in a deed, and the acknowledgment of its payment is no more than a receipt — a statement of a fact which is not necessary to the validity of the deed. It is only prima facie evidence of what it states, but not conclusive except that there was some consideration. Such a recited consideration is not intended to be contractual, and therefore, works no estoppel as to amount or character, or, in other words, the parties in such case are not estopped from showing by parol evidence the amount and character of the consideration to be different from that recited in the deed." *Holt v. Holt*, 57 Mo. App. 272 (1894); *Kiser v. Carrollton Dry Goods Co.*, (Ga.) 22 S. E. 303 (1895).

MISTAKE. — It is not a violation of the "parol evidence rule" to admit parol evidence to show that a written instrument was executed under a mutual mistake of fact.

Either for the purpose of reforming the instrument itself. *Bryce Lorillard v. Ins. Co.*, 55 N. Y. 240 (1873); *Milmine v. Burnham*, 76

Ill. 362 (1875); *Merchants' Bank v. Morrison*, 19 Grant's Chan. Rep. 1 (1872); *Elofrson v. Lindsay*, 63 N. W. 89 (1895); *Avery v. Miller*, 86 Ala. 495 (1888); *Goode v. Riley*, 153 Mass. 585 (1891); *Nelson v. Davis*, 40 Ind. 366 (1872); *Smith v. Butler*, 11 Oreg. 46 (1883); *Cleveland v. Burnham*, 64 Wis. 347 (1885); *Fudge v. Payne*, 86 Va. 303 (1889); *Ewing v. Sandoval, &c. Co.*, 110 Ill. 290 (1884); *Miller v. Davis*, 10 Kans. 541 (1873); *Allen v. Yeater*, 17 W. Va. 128 (1880); *Gammage v. Moore*, 42 Tex. 170 (1875); *Dickinson v. Glenney*, 27 Conn. 104 (1858).

Or of refusing it any legal effect. *Mayo v. Dwight*, 82 Pa. St. 462 (1876); *Vignie v. Brady*, 35 La. Ann. 560 (1883); *Gladdish v. Godchaux*, 46 La. Ann. 1571 (1894); *Montgomery v. Shockey*, 37 Ia. 107 (1873); *Hearst v. Pujol*, 44 Cal. 230 (1872); *Goltra v. Sanasack*, 53 Ill. 456 (1870); *McMurray v. St. Louis Oil Co.*, 33 Mo. 377 (1863); *Winslow v. Driskell*, 9 Gray, 363 (1857); *Byrd v. Campbell, &c. Co.*, 94 Ga. 41 (1894).

"So it is settled, at least in equity, that this particular kind of parol evidence, that is to say, evidence of mutual mistake as to the meaning of the words used, is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing." *Goode v. Riley*, 153 Mass. 585 (1891).

As in other cases, the parol evidence in cases of mistake is admissible solely because, as a matter of the substantive law, the facts sought to be established in this way constituted a ground for relief against the effect of the ascertained purport of the instrument. Where the facts sought to be proved are not competent as constituting ground for relief, parol evidence is not admissible to prove them.

So a mistake of law cannot be proved by parol; — not because the evidence is by parol but because the fact of such a mistake would not afford ground for relief against the operation of the written instrument. *Mellish v. Robertson*, 25 Vt. 603 (1853); *Gebb v. Howell*, 40 Md. 387 (1874); *Thurmond v. Clark*, 47 Ga. 500 (1873); *Moorman v. Collier*, 32 Ia. 138 (1871); *Heavenridge v. Mondy*, 49 Ind. 434 (1875).

INCOMPLETE DELIVERY. — It in no way contradicts or varies a written instrument to show that it was never delivered as an operative instrument. *Lipscomb v. Lipscomb*, 32 S. C. 243 (1889). "A party, sued by his promisee, is always permitted to show a want or failure of consideration for the promise relied upon, and so he may prove by parol that the instrument itself was delivered even to the payee to take effect only on the happening of some future event. (*Seymour v. Cowing*, 1 Keyes, 532; *Benton v. Martin*, 52 N. Y. 570; *Eastman v. Shaw*, 65 id. 522), or that its design and object were different from

what its language, if alone considered, would indicate. (*Denton v. Peters*, L. R., 5 Q. B. 474; *Blossom v. Griffin*, 3 Kern. 569; *Hutchins v. Hebbard*, 34 N. Y. 24; *Seymour v. Cowing*, *supra*; *Barker v. Bradley*, 42 N. Y. 316, 1 Am. Rep. 521; *Grierson v. Mason*, 60 N. Y. 394; *De Lavallette v. Wendt*, 75 id. 579, 31 Am. Rep. 494). He may also show that the instrument relied upon was executed in part performance only of an entire oral agreement (*Chapin v. Dodson*, 78 N. Y. 74; 34 Am. Rep. 512), or that the obligation of the instrument has been discharged by the execution of a parol agreement collateral thereto (*Crosman v. Fuller*, 17 Pick. 171), or he may set up any agreement in regard to the note which makes its enforcement inequitable." *Juilliard v. Chaffee*, 92 N. Y. 529 (1883).

So it may be shown by parol that a written instrument is not to become operative except upon the happening of a certain contingency. *Blewitt v. Boorum*, 142 N. Y. 357 (1894); *Smith v. Mussetter*, 58 Minn. 159 (1894). For example, the assent of a surety. *Wilson v. Powers*, 131 Mass. 539 (1881). Or that the indebtedness of a partnership did not exceed a certain amount. *Beall v. Poole*, 27 Md. 645 (1867).

Or that a certain partnership should continue. *Norman v. Waite*, 30 Neb. 302 (1890).

Or that the approval of A. should be first obtained. *McCormick, &c. Co. v. Richardson*, 89 Ia. 525 (1893).

Or that satisfactory reports should be obtained from a commercial agency. *Reynolds v. Robinson*, 110 N. Y. 654 (1888).

It may be shown by parol that an instrument was delivered signed in blank with instructions as to filling in which have not been complied with. *Richards v. Day*, 137 N. Y. 183 (1893). Or that it was not delivered in payment of certain debts. "It is our opinion that the pleading of this matter was not an offer of parol testimony to vary the terms of a written instrument. It is not the terms of the written instrument that are sought to be varied or contradicted by this evidence. Instead of that, it is simply a presumption, which, it is claimed by the plaintiff, arose from the fact of executing the instrument that is sought to be varied by this parol testimony. The defendant concedes the written instrument, in all its force. He concedes his liability upon it. The plaintiff contends that the execution of this instrument — that is, the acceptance of the bill of exchange — was a waiver of defendant's alleged counterclaims existing at that time. The written instrument itself does not, on its face, disclose such waiver, but the waiver, if any there were, is a result, or an inference, or a presumption from the fact of executing the instrument, and the fact of the existence of the counterclaims at the time of such execution. Now, this parol evidence is offered to overthrow nothing in the instrument itself, but simply to combat an inference or presumption drawn from the instrument and other

facts. This presumption is not a written instrument, nor contained in the terms of a written instrument. Therefore to overthrow it is not varying the terms of the instrument." *Bohn Mfg. Co. v. Harrison*, 13 Mont. 293 (1893).

So it may be shown in case of a promissory note, in an action between the maker and payee, that it was verbally agreed, at the time of making the note, that it should not become operative as a note until the maker could examine the property for which it was to be given and determine whether he would purchase it. *Burke v. Dulaney*, 153 U. S. 228 (1893).

Or was signed by the parties not intending it as an operative instrument. *Earle v. Rice*, 111 Mass. 17 (1872).

Or was deposited in escrow. *Roberts v. Mullenix*, 10 Kans. 22 (1872); *Stanton v. Miller*, 65 Barb. 58 (1873).

Or was to become operative only in case the signatures of other persons should be procured. "This condition was independent of the terms of the agreement, or the things agreed to be done, and therefore it pertained to the consideration upon which the agreement was founded. The evidence showing it, does not vary or add to the obligations which the defendants had undertaken, by the terms of the agreement, but goes to the performance of a condition as the basis on which it was founded; and for this reason the evidence was competent in law, and it fully warranted the opinion, that the consideration for the agreement had failed, and consequently, that the defendants were not bound by it." *Butler v. Smith*, 35 Miss. 457, 463 (1858); *Belleville Savings Bank v. Bornman*, 124 Ill. 200 (1888); *Kelly v. Oliver*, 113 N. C. 442 (1893); *Merchants' Nat. Bank v. McAnulty* (Tex.), 31 S. W. 1091 (1895).

But, on the contrary, it has been held in New York that it is not competent to prove that at the time a composition release by creditors was signed by the plaintiff there was an oral statement made to him by the debtor that the release should not be operative unless all the creditors had signed. "They sought to incorporate in the instrument, by oral evidence, a condition not expressed in the writing. The release on its face purported to be absolute and unconditional, and binding upon all the creditors who should sign it." *Van Bokkelen v. Taylor*, 62 N. Y. 105 (1875).

To receive this evidence the supreme court of Connecticut say would not only be to substitute fallible media "for a medium whose accuracy the parties affirm" but would often be "to substitute an abandoned for a rejected contract." *Beard v. Boylan*, 59 Conn. 181 (1890).

While a conditional delivery of a deed to a grantee gives absolute effect to the instrument, yet where a contract under seal, not required to be so executed, is claimed to have been conditionally delivered the condition may be shown by parol. *Blewitt v. Boorum*, 142 N. Y. 357 (1894).

That even a delivery of a deed to a grantee may be shown by parol to have been conditional, see *Black v. Sharkey*, 104 Cal. 279 (1894).

DISCHARGE, WAIVER, MODIFICATION, &c. — The parol evidence rule is in no way contravened by evidence tending to show that a written instrument should not operate according to its tenor because it has been discharged or rescinded. *Walker v. Wheatly*, 2 Humph. 119 (1840); *Maysville, &c. R. R. v. Pellam*, 20 S. W. 384 (1892).

Or waived by the declarations or other acts of the parties. *Leathe v. Bullard*, 8 Gray, 545 (1857); *Lawrence v. Dole*, 11 Vt. 549 (1839); *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89 (1889); *Brady v. Cassidy*, 145 N. Y. 171 (1895).

Or that a subsequent agreement has been substituted by consent. *Le Fevre v. Le Fevre*, 4 S. & R. 241 (1818); *Guidery v. Green*, 95 Cal. 630 (1892); *Magill v. Stoddard*, 70 Wis. 75 (1887); *Marshall v. Baker*, 19 Me. 402 (1841); *Bannon v. Aultman*, 80 Wis. 307 (1891); *Branch v. Wilson*, 12 Fla. 543 (1868); *Whitney v. Wall*, 17 U. C. C. P. 474 (1867); *Gibbons v. Ellis*, 83 Wis. 434 (1892); *Wilson v. McClenny*, 32 Fla. 363 (1893); *Osborne v. Stringham*, 4 So. Dak. 593 (1894); *Collins v. Stanfield*, 139 Ind. 184 (1894).

Though the original agreement was within the statute of frauds, the modification may be by parol. *Stearns v. Hall*, 9 Cush. 31 (1851); *Eastman v. Roland*, 2 L. C. Law Jour. 216 (1867).

Or that the terms of a written contract have been subsequently modified by parol. *Brown v. Deacon*, 12 Grant's Ch. 198 (1866); *First Nat. Bank v. Post*, 65 Vt. 222 (1892); *Strauss v. Gross*, 2 Tex. Civ. App. 432 (1893).

It is equally unobjectionable to introduce parol evidence of excuses for non-performance of a written contract. *Davis v. Crookston, &c. Co.*, 57 Minn. 402 (1894).

